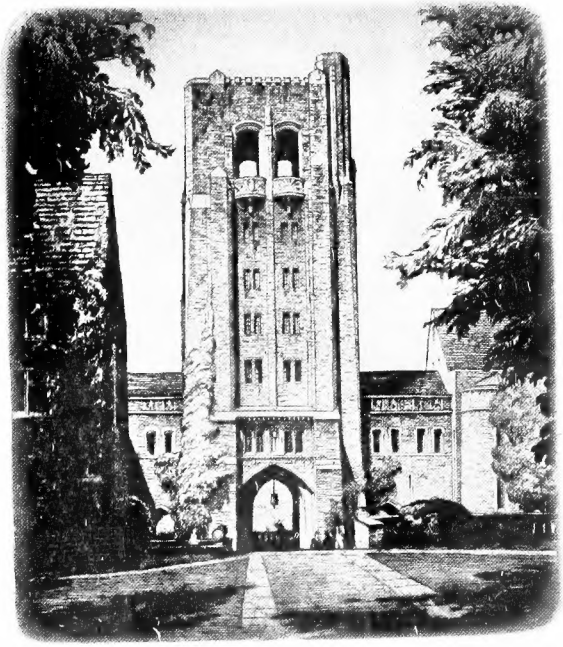


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A TREATISE

ON THE

LAW OF DAMAGES

EMBRACING

AN ELEMENTARY EXPOSITION OF THE LAW

AND ALSO

ITS APPLICATION TO PARTICULAR SUBJECTS OF CONTRACT AND TORT

BY

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THIRD EDITION

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[363] **§ 1008. Scope of chapter.** The damages recoverable, after judgment for the plaintiff in ejectment, for withholding possession, or in the action for recovery of possession of real property, have been discussed in the foregoing chapter. These result from, or are connected with, the loss or suspension of the plaintiff's possession, and cannot be recovered until it is regained. When there has been a re-entry, whether pursuant to a judgment of restitution or otherwise, all the damages from the ouster to the re-entry may be recovered.[1] But all injuries to real estate do not involve a loss of possession; so those to the inheritance may be redressed by action though the owner is not in possession.[2] These will constitute the subject of the present chapter.

[1] Cutting v. Cox, 19 Vt. 517; Smith v. Wunderlich, 70 Ill. 426; Stevens v. Hollister, 18 Vt. 294, 46 Am. Dec. 154; Holmes v. Seely, 19 Wend. 507; Smith v. Ingram, 8 Ired. 175; Allen v. Thayer, 17 Mass. 299; Illinois, etc, Coal Co. v. Cobb, 82 Ill. 183; Wohler v. Buffalo, etc. R. Co., 46 N. Y. 686; Western Book & S. Co. v. Jevne, 179 Ill. 71, 53 N. E. Rep. 565, 78 Ill. App. 668; Alliance Trust Co. v. Nettleton Hardwood Co., 74 Miss. 584, 21 So. Rep. 396, 60 Am. St. 531, 36 L. R. A. 155. See Tracy v. Butters, 40 Mich. 406.

[2] Meehan v. Edwards, 92 Ky. 574.

Section 1.

TRESPASS TO REAL PROPERTY.

§ 1009. The gist of the action. The gist of this action is the injury to the plaintiff's possession;[1] only the party actually or constructively in possession at the time the trespass was committed can sue.[2] Where the land on which the trespass is committed is not in the actual occupation of any person [**364**] the plaintiff may prove constructive possession by showing his title.[3] One person may have possession of the surface and another of the subsoil, or mines and minerals.[4] The possession is presumed to be in the owner of the legal title in the absence of all other evidence; or, in other words, no one being shown to be in adverse possession he will be presumed to be in possession,[5] and it will also be presumed that his possession is coextensive with his grant.[6] In case of a mixed possession, no other right or title being shown by either of the parties, he

18 S. W. Rep. 519; Perry v. Bailey, 94 Me. 50, 46 Atl. Rep. 789.

[1] Booth v. Sherwood, 12 Minn. 426; Smith v. Wunderlich, 70 Ill. 426; Reed v. Brice, 30 Mo. 442; Fore v. Western, etc. R. Co., 101 N. C. 526, 8 S. E. Rep. 335.

[2] Smith v. Ingram, 8 Ired. 175; Abbott v. Abbott, 51 Me. 575; Little v. Palister, 3 id. 6; Lyford v. Toothaker, 39 id. 28; Holmes v. Seely, 19 Wend. 507; West v. Lanier, 9 Humph. 762; Smith v. Wunderlich, 70 Ill. 426; Campbell v. Arnold, 1 Johns. 511; Wickham v. Freeman, 12 id. 183; Van Rensselaer v. Radcliff, 10 Wend. 639, 25 Am. Dec. 582; Lienow v. Ritchie, 8 Pick. 235; French v. Fuller, 23 id. 104; Owings v. Gibson, 2 A. K. Marsh. 515; Foster v. Fletcher, 7 T. B. Mon. 534, 18 Am. Dec. 208; Miller v. Fulton, 4 Ohio, 433; Zimmerman v. Shreeve, 59 Md. 357; Yellow River R. Co. v. Harris, 35 Fla. 385, 17 So. Rep. 568; Wilkinson v. Connell, 158 Pa. 126, 27 Atl. Rep. 870; Gulf, etc. R. Co. v. Smith, 3 Tex. Civ. App. 483, 23 S. W. Rep. 89; Garrett v. Sewell, 108 Ala. 521, 18 So. Rep. 737; Galt v. Chicago, etc. R. Co., 157 Ill. 125, 41 N. E. Rep. 643; Allen v. Macon, etc. R. Co., 107 Ga. 838, 33 S. E. Rep. 696; Carter v. Pitcher, 87 Hun, 580, 34 N. Y. Supp. 549; Louisville & N. R. Co. v. Hall, 131 Ala. 161, 32 So. Rep. 603; Sposato v. City of New York, 75 App. Div. 304, 78 N. Y. Supp. 168.

[3] Booth v. Sherwood, 12 Minn. 426; Yorgensen v. Yorgensen, 6 Neb. 383; Jenkins v. Lykes, 19 Fla. 148, 161, 45 Am. Rep. 19; Louisville & N. R. Co. v. Hall, *supra*.

The owner of a cemetery lot may maintain an action for the removal of the remains of a child interred therein. Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Smith v. Thompson, 55 Md. 5, 39 Am. Rep. 409. See Bessemer Land & Imp. Co. v. Jenkins, 111 Ala. 135, 18 So. Rep. 565.

[4] Cox v. Glue, 5 C. B. 533.

[5] Griffin v. Creppin, 60 Me. 270; Smith v. Wunderlich, 70 Ill. 426.

[6] Melcher v. Merryman, 41 Me. 601.

who first acquired the actual and exclusive possession may maintain trespass for the exportation of a fence put on the land by him.[1] If the title to a dwelling is in the husband, and during his absence and without the consent of his wife, a person enters the same, the wife being present, her possession is exclusive to the extent that she may recover such damages as were sustained by reason of the invasion of her possession, though no direct assault was made upon her.[2] The Iowa court, going further, has sustained the wife's right of action for a trespass which resulted in injury to her though her husband was in the house when it was committed. "It was her home as well as that of her husband; her right to its peaceful and quiet enjoyment day or night was equal to that of her husband; and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she ought to recover."[3] The administrator of a husband who owned land jointly with his wife cannot maintain an action for trespass committed during the life of the decedent; though the wife may do so.[4] Though the possession is by wrong, it will sustain the action against a stranger.[5] If an action is against the person in possession the burden of proving title is on the plaintiff.[6] Possession at the time the trespass was committed is all that is necessary to give a right of action; it need not continue until suit is brought.[7]

§ 1010. Definition of trespass and scope of the remedy. Every unauthorized intrusion into the land of another is suffi-

[1] Coffin v. Lawson, 7 Houst. 327, 32 Atl. Rep. 79.

[2] Ford v. Schliessman, 107 Wis. 479, 83 N. W. Rep. 761. See Newell v. Whitcher, 53 Vt. 389.

[3] Watson v. Dilts, 116 Iowa, 249, 89 N. W. Rep. 1068, 57 L. R. A. 559.

[4] Spruill v. Branning Manuf. Co., 130 N. C. 42, 40 S. E. Rep. 824.

[5] Rollins v. Clay, 33 Me. 132; Wilder v. House, 48 Ill. 279; Reeder v. Purdy, 41 Ill. 279; Meader v. Stone, 7 Met. 147; Yeates v. Allin, 2 Dana, 134; Ives v. Ives, 13 Johns. 235; Reed v. Price, 30 Mo. 442; Jenkins v. McCoy, 50 Mo. 348; Doty v. Burdick, 83 Ill. 473; Oklahoma v. Hill, 6 Okl. 114, 50 Pac. Rep. 242; Northern Pacific R. Co. v. Lewis, 51 Fed. Rep. 658; Gulf, etc. R. Co. v. Johnson, 54 Fed. Rep. 474, 4 C. C. A. 447; Davenport v. Newton, 71 Vt. 11, 42 Atl. Rep. 1087; Haws v. Victoria Copper Mining Co., 160 U. S. 303, 317, 16 Sup. Ct. Rep. 282, and cases cited; Bass v. West, 110 Ga. 698, 36 S. E. Rep. 244, citing the text.

[6] Miller v. Wellman, 75 Mich. 353, 42 N. W. Rep. 843.

[7] Carner v. Chicago, etc. R. Co., 43 Minn. 375, 45 N. W. Rep. 713; Natchez, etc. R. Co. v. Currie, 62 Miss. 506.

cient trespass to support an action for breaking the close.[1] It is immaterial to the cause of action that no actual injury is done, or that the tortious act of the defendant is even beneficial to the plaintiff.[2] His legal right being invaded by the intrusion, he is entitled at least to nominal damages in order to vindicate that right and recover his costs.[3] When the plaintiff's land is illegally entered [4] a cause of action at once arises; whatever is done after the breaking and entry is but an aggravation of damages.[5] The action of trespass *quare clausum fregit*, therefore, may embrace, for the purpose of compensation to the owner, as well as punitory damages, all the things done and said by the defendant in the course and forming part of the *res gestæ* of such breaking and entry, and all the natural and proximate effects which ensue.[6] Where an excavation was made in a street in disregard of the statute respecting the establishment of grades it was right to receive evidence as to the damage done to trees, shrubbery, grass and the well on the premises.[7] If only one joint trespasser is sued the plaintiff cannot prove, in aggravation of damages, the distinct and unconnected acts of the other.[8]

There is a disposition to extend the scope of actions for trespass so as to include damages done to property by concussion

[1] Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. Rep. 384; Dougherty v. Stepp, 1 Dev. & B. 371. See Forbell v. New York, 164 N. Y. 522, 58 N. E. Rep. 644.

[2] Murphy v. Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181; Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; Blaen Avon Coal Co. v. McCulloch, 59 Md. 403; Fisher v. Dowling, 66 Mich. 370, 33 N. W. Rep. 521. See §§ 9, 10, 1022, 1037.

[3] Id.; Empire Gold Mining Co. v. Bonanza Gold Mining Co., 67 Cal. 406, 7 Pac. Rep. 810; Baltimore & O. R. Co. v. Boyd, 67 Md. 32, 10 Atl. Rep. 315, 1 Am. St. 362; United States v. Mock, 149 U. S. 273, 13 Sup. Ct. Rep. 848; Howard v. Dayton Coal & Iron Co., 94 Ga. 416, 20 S. E. Rep. 336. See Stewart v. Sefton, 108 Cal. 197, 41 Pac. Rep. 293.

[4] Garrett v. Sewell, 108 Ala. 521, 18 So. Rep. 737.

[5] Cook v. Redman, 45 Mo. App. 397; Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Brown v. Manter, 22 N. H. 468; Ferrin v. Symonds, 11 id. 365; Kolb v. Bankhead. 18 Tex. 229.

[6] Damron v. Roach, 4 Humph. 134; Tissot v. Great Southern Tel. & T. Co., 38 La. Ann. 996, 3 So. Rep. 261, 4 Am. St. 248; Carter v. Bedortha, 124 Mich. 548, 83 N. W. Rep. 277; Stevens v. Stevens, 96 Ga. 374, 23 S. E. Rep. 312.

[7] Brown v. Webster City, 115 Iowa, 511, 88 N. W. Rep. 1070; Millard v. Same, 113 Iowa, 220, 84 N. W. Rep. 1044.

[8] Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17.

or vibration of the earth through the use of powerful explosives which are intrinsically dangerous, regardless of the skill used. In a case in which a stone was thrown by a blast against a building the city for which the work was being done was liable for the injury resulting to the building.[1] In a later case, in which there was no actual invasion of the plaintiff's property, all the damage being done by concussion or vibration caused by explosives used in a tunnel, the same court said, referring to the case stated: It is true that in that case there was an actual invasion of the property of the plaintiff, the explosion having precipitated a rock against his building; but liability for injuries caused by actual invasion of the property or by the concussion or vibration of the earth or air are within the doctrine there announced. If one who, for his own purposes and profit, undertakes to perform a work by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by these explosives on the property of such other, it is only by the merest subtility of reasoning he should be held not liable to respond for equal or greater damages caused by concussion of the air or of the earth.[2] As will be seen by the note, there are courts of high standing which do not fully acquiesce in this doctrine. In Iowa an action of trespass lies against a city where it injures abutting property by cutting down a street without having established a grade therefor as required by statute, though there was no trespass or direct encroachment on the plaintiff's premises, and the fee to the street was in the city.[3]

§ 1011. Damages confined to compensation. If the nature of the wrong done and the circumstances connected with it

[1] Fitz Simons & C. Co. v. Braun, 199 Ill. 390, 65 N. E. Rep. 249; Bradford Glycerine Co. v. St. Mary's Woolen Manuf. Co., 60 Ohio St. 560, 71 Am. St. 740, 45 L. R. A. 658, 54 N. E. Rep. 528; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. Rep. 395, 58 Am. Rep. 556; Munroe v. Pacific Coast Dredging & R. Co., 84 Cal. 515, 24 Pac. Rep. 303, 18 Am. St. 248. *Contra*, if the work is done with due care, Benner v. Atlantic Dredging Co., 134 N. Y. 156, 31 N. E. Rep. 328, 30 Am. St. 649, 17 L. R. A. 220; Murphy v. Lowell, 128 Mass. 396, 35 Am. Rep. 381.

[2] Scherrer v. Baltzer, 84 Ill. App. 126; Higby v. Williams, 16 Johns. 214.

[3] Richardson v. Webster City, 111 Iowa, 427, 82 N. W. Rep. 920; Millard v. Same, Brown v. Same, *supra*.

are such as do not authorize the imposition of exemplary damages, the recovery must be for such sum as will compensate for the injury done. This cannot be increased in the discretion of the jury,[1] nor will less than that be awarded by a court of equity merely because the wrong was unwittingly done.[2] In trespass for taking animals *ferœ naturæ*, the land-owner can recover for the trespass only.[3] As will more fully appear in the course of this chapter, there is not entire agreement in the application of the universally accepted principle that the recovery must only be commensurate with the damage inflicted. It is only necessary to note here one phase of this conflict of authority. Thus, it is laid down that the rental value of land which is unlawfully entered upon and cultivated is the measure of the trespasser's liability, added to which may be compensation for such other damages as resulted from the entry and the improper use and cultivation of the land.[4] In a case in the privy council the trespasser was held liable for the value of the produce which the lands were capable of yielding at the time they were taken possession of, less the expenses of management. It was also ruled that there was no law authorizing the disallowance of such expenses, no matter how wilful and long continued the trespass may have been.[5] The Iowa court has taken a different view, and ruled that where the trespass was wilful the damages are measured by the value of the crops and hay secured by the trespasser. "The theory of the rule seems to be that a crop produced by a trespassing act is the property of the owner of the soil, and the trespasser has no such interest in it that he can deprive the owner of it, or of its possession, and that the owner of property is entitled to its value if converted by another."[6]

[1] Steele v. Davis, 75 Ind. 191; Flynt v. Chicago, etc. R. Co., 38 Mo. App. 98; Thompson v. Evans, 49 Ill. App. 289; Tome Institute v. Crothers, 87 Md. 569, 40 Atl. Rep. 261; McArthur v Cornwall, [1892] App. Cas. 75.

[2] Atlantic, etc. Coal Co. v. Maryland Coal Co., 62 Md. 135; Garrett v. Sewell, 108 Ala. 521, 18 So. Rep. 737.

[3] Beach v. Morgan, 67 N. H. 529, 41 Atl. Rep. 349.

[4] Johnson v. Park, 13 Ky. L. Rep. 437, 17 S. W. Rep. 273; Frizzell v. Duffer, 58 Ark. 612, 25 S. W. Rep. 1111.

[5] McArthur v. Cornwall, [1892] App. Cas. 75.

[6] Kiernan v. Heaton, 69 Iowa, 136, 28 N. W. Rep. 478; Negley v. Cowell, 91 Iowa, 256, 59 N. W. Rep. 48, 51 Am. St. 345.

[365] **§ 1012. Damages where tenant sues.** Damages in this action may be such as are appropriate to the tenure by which the plaintiff holds, and such as result from the injury suffered. Possession alone will entitle him to recover damages for any injury solely affecting it.[1] If he seeks to recover for the future he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right,[2] unless he holds in such relation to the other parties interested that his recovery will bar their claim.[3] The same act may be injurious to several persons having different interests: to a tenant, or one having a limited estate in possession, by the interruption of his enjoyment and the diminution of his profits;[4] to a landlord, or one having an expectant estate in reversion or remainder, by the more permanent injury to his property. Both may have separate actions for their several damages.[5] Where a stranger cuts down trees a tenant can recover only in respect of shade, shelter and fruit; for he is entitled to no more.[6] A tenant at will may recover

[1] Tobin v. French, 93 Ill. App. 18 (possession pending an appeal from a judgment against the tenant in an action of forcible detainer); Frisbee v. Marshall, 122 N. C. 760, 30 S. E. Rep. 21; Townley v. Oregon R. Co., 33 Ore. 323, 54 Pac. Rep. 150; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. Rep. 744.

[2] Zimmerman v. Shreeve, 59 Md. 357; Salisbury v. Western, etc. R. Co., 98 N. C. 465, 4 S. E. Rep. 465; I. & G. N. R. Co. v. Benitos, 59 Tex. 326; International, etc. R. Co. v. Ragsdale, 67 id. 24, 2 S. W. Rep. 515; Stratton v. Lyons, 53 Vt. 641; Gilbert v. Kennedy, 22 Mich. 117; Elliott v. Missouri Pacific R. Co., 8 Kan. App. 191, 55 Pac. Rep. 490; Frisbee v. Marshall, 122 N. C. 760, 30 S. E. Rep. 21; Gwaltney v. Scottish Carolina Timber Co., 115 N. C. 579, 20 S. E. Rep. 465; Winborne v. Elizabeth City Lumber Co., 130 N. C. 32, 40 S. E. Rep. 825.

[3] Woods v. Banks, 14 N. H. 101; Hibbard v. Foster, 24 Vt. 542; Bigelow v. Rising, 42 Vt. 678; Nims v. Troy, 59 N. Y. 500; Jackson v. Todd, 25 N. J. L. 121; Harker v. Dement, 9 Gill, 7; Hueston v. Mississippi & R. R. Boom Co., 76 Minn. 251, 79 N. W. Rep. 92, quoting the text. See § 1057.

[4] Pye v. Faxon, 156 Mass. 471, 31 N. E. Rep. 640, citing Stetson v. Faxon, 19 Pick. 147; French v. Connecticut River Lumber Co., 145 Mass. 262, 14 N. E. Rep. 113; Fritz v. Hobson, 14 Ch. Div. 542. To the same effect, Hueston v. Mississippi & R. R. Boom Co., *supra*.

[5] George v. Fisk, 22 N. H. 32–45; Lane v. Thompson, 43 id. 320; Jesser v. Gifford, 4 Burr. 2141; Hamden v. Rice, 24 Conn. 350; Reeder v. Purdy, 41 Ill. 279; Starr v. Jackson, 11 Mass. 519; Jackson v. Todd, 25 N. J. L. 121; Bennett v. Thompson, 13 Ired. 146; Zimmerman v. Shreeve, 58 Md. 357; Anthony v. New York, etc. R. Co., 162 Mass. 60, 37 N. E. Rep. 780; Bailey v. Siegel Gas Fixture Co., 54 Mo. App. 50.

[6] Bedingfield v. Onslow, 3 Lev. 209.

for the destruction of standing grass to the extent that the usable value of the land is thereby lessened.[1] The damages recoverable by a tenant for an injury to the leased land are measurable by the decrease in the rental value thereof for such time as he is entitled to the use of it.[2] He may recover for an injury which impairs the value of his possession; also for one which imposes an additional burden in the performance of his covenant to repair.[3] If an injury is done to a building which he must keep in repair that liability entitles him to recover damages therefor.[4] And where a lessee is bound to rebuild destroyed buildings, and may remove those on the premises and erect others, he has such an interest in those burned by a third party as entitles him to recover their value.[5]

A tenant for years has a right to be compensated for all injury done to his possession and to his rights as lessee; and in ascertaining such injury the expense necessary to restore the building to such a state as would make the possession as beneficial for his purposes as it was before the trespass was committed should be allowed.[6] The allowance of damages in favor of a tenant on account of injury to the estate, however, should not [366] exceed the value of his term, including the rent he is bound to pay.[7] Where T. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually, the lessee covenanting that he would not dig more, or, if he did, to pay an increased rent of 375*l.* per half-acre, being after the same rate that the whole brick earth was

While a lessee for years may maintain an action for trespass by cutting trees on the leased premises, he cannot recover treble damages under a statute imposing that measure of liability in favor of the "owner." Lewis v. Thompson, 3 App. Div. 329, 38 N. Y. Supp. 316; Edwards v. Hill, 11 Ill. 22; Achey v. Hull, 7 Mich. 423; McCleary v. Anthony, 54 Miss. 708.

[1] St. Louis, etc. R. Co. v. Hall, 74 S. W. Rep. 293 (Ark.).

[2] Elliott v. Missouri Pacific R. Co., 8 Kan. App. 191, 55 Pac. Rep. 490.

[3] Hardrop v. Gallagher, 2 E. D. Smith, 523; Buddin v. Fortunato, 16 Daly, 195, 10 N. Y. Supp. 115; Weston v. Gravlin, 49 Vt. 507.

[4] Gourdier v. Cormack, 2 E. D. Smith, 200.

[5] Anthony v. New York, etc. R. Co., 162 Mass. 60, 37 N. E. Rep. 780.

[6] Willis v. Branch, 94 N. C. 142.

[7] Walter v. Post, 4 Abb. Pr. 382.

For circumstances under which the probability of the tenant's securing a renewal of his lease and under which he recovered the value of a building destroyed, see McPhillips v. Fitzgerald, 76 App. Div. 15, 78 N. Y. Supp. 631.

sold for, and a stranger dug and took away brick earth, it was held the lessee was entitled to recover against him and retain the full value of it.[1] It is laid down as a general rule that if a trespass necessitates the abandonment of leased premises the tenant may recover the value of them for rent during the remainder of the term. If an established business was conducted thereon the value of the good-will and the loss of profits resulting, if ascertainable with a reasonable degree of certainty, may be considered in estimating the rental value of the premises.[2] Where the trespass resulted in ousting a tenant of his possession of part of a farm, no injury being done to his crop, the diminution of rental value was measured by the injury done to the entire farm. "The loss of a single field, by disarranging the operations of a farm as a whole, may cause an injury much greater than the rental value of the acres taken. The real loss is the value of the use of the part taken in connection with that which remains, and it is measured by the difference in rental value. This measure is reasonably free of uncertainty, it is easy of ascertainment and of general application."[3]

Where it appears that the plaintiff entered as tenant he must prove his lease in order to recover more than nominal damages for other than past injury to his possession.[4] Where the defendant, sued for pulling down a wall on the premises, received a lease five days after the trespass, the plaintiff was only allowed nominal damages, it appearing that he entered under the same lessor and did not think proper to show his lease.[5] Under a statute making an unrecorded lease void, a lessee in possession may prove his right if the lease is recorded before the trial is finished, or perhaps before judgment if there was no intervening title of record.[6]

A plaintiff in possession under color of title to the fee can recover against a stranger as owner. If the defendant be a mere intruder he cannot set up title in a third person, either to affect the cause of action or in mitigation.[7] One in posses-

[1] Attersoll v. Stevens, 1 Taunt. 183.

[2] Bass v. West, 110 Ga. 698, 36 S. E. Rep. 244.

[3] Irwin v. Nolde, 176 Pa. 594, 35 Atl. Rep. 217.

[4] Gilbert v. Kennedy, 22 Mich. 117; Bass v. West, 110 Ga. 698, 705, 36 S. E. Rep. 244, citing the text.

[5] Twyman v. Knowles, 13 C. B. 222.

[6] Anthony v. New York, etc. R. Co., 162 Mass. 60, 37 N. E. Rep. 780.

[7] Reed v. Price, 30 Mo. 442–447;

sion under a contract of purchase and entitled to a conveyance is virtually the owner;[1] and though the whole purchase-money has not been paid, may recover all the damages done by a trespasser.[2] A licensee to mine ores has no interest or estate in the soil or mine containing them, nor in the mineral so long as they remain in place. In an action against a trespassing stranger who has dug ore from the land covered by the plaintiff's license the latter cannot recover the value thereof, though he might recover damages if the trespasser so diminished the supply of ore that enough did not remain to satisfy his right.[3]

§ 1013. Damages where suit by executor, etc. An executor may sue for a trespass committed on his testator's lands during the latter's life-time; and where such lands are devised to him in trust for defined purposes he may sue for a trespass committed on them after the testator's death. Both causes of action may be united.[4] A personal representative who has not asserted his statutory right to the possession of the decedent's realty cannot maintain an action for injuries thereto committed *post mortem decedentis;* his right to do so is limited to the property in his control or possession. But if he has asserted his rights by taking possession his possession relates back to the decedent's death, although the wrong complained of was committed intermediate these events and before administration was granted. If the land is vacant bringing an action for the trespass is equivalent to taking possession.[5] In such a case the personal representative may recover the full amount of damage done the premises, regardless of the amount of claims against the estate or any rights the defendant may have acquired through the decedent's heirs.[6] In a suit brought by the heirs it is proper to make their father, the owner of a life estate in a portion of the injured property,

Illinois, etc. R. Co. v. Cobb, 94 Ill. 55; First Parish of Shrewsbury v. Smith, 14 Pick. 297; Ganter v. Atkinson, 35 Wis. 48; Todd v. Jackson, 26 N. J. L. 525; Hebert v. Lege, 29 La. Ann. 511.

[1] Honsee v. Hammond, 39 Barb. 89.

[2] Hueston v. Mississippi & R. R. Boom Co., 76 Minn. 251, 79 N. W. Rep. 92.

[3] Arnold v. Bennett, 92 Mo. App. 156; Baker v. Hart, 123 N. Y. 470, 25 N. E. Rep. 948, 12 L. R. A. 60.

[4] Pittsburgh, etc. R. Co. v. Swinney, 97 Ind. 586.

[5] Noon v. Finnegan, 29 Minn. 418, 13 N. W. Rep. 197.

[6] S. C., 32 Minn. 81, 19 N. W. Rep. 391.

a party. If they are minors and he alleges ownership in them, he thereby estops himself from afterwards recovering for the injury done to his interest, and damages may be recovered for the injury done to the whole estate.[1] One who has conveyed land to a trustee cannot, on the annulment of his conveyance, subsequent to the committal of a trespass on the premises, recover damages on the theory that the cancellation operated retrospectively to restore his rights as owner.[2]

§ 1014. Damages measured by benefit received. The damages will be such as result from the injury the plaintiff has suffered. If the defendant derives a benefit from the tortious use of the plaintiff's premises the latter will be entitled to damages measured thereby.[3] Where the defendant tortiously used a canal the court said trespass could be brought for entering and breaking the plaintiff's close, and he could allege and prove the use of the canal as special damages.[4] He will be entitled to recover the value of the use.[5] In a recent English case it appeared that the defendant had trespassed on the plaintiff's land by tipping spoil thereon from his colliery. It was contended for the former that his liability was measured by what the plaintiff had lost — the diminution in the value of the land. The court was of a contrary opinion and ruled that the amount of damages was not to be assessed by ascertaining merely the diminution in value of the land, but that the principle of what it designated as the way-leave cases[6] applied: namely, that if one person without leave of another

[1] Fort Worth, etc. R. Co. v. Pearce, 75 Tex. 281, 12 S. W. Rep. 864.

On the death of the owner of land after a referee has made a report in his favor, on the substitution of the administrator as plaintiff, the damages recoverable cannot exceed those sustained before the action was begun. Mitchell v. White Plains, 91 Hun, 189, 36 N. Y. Supp. 935.

[2] Salisbury v. Western, etc. R. Co., 98 N. C. 465, 4 S. E. Rep. 465.

[3] Merriwether v. Bell, 58 S. W. Rep. 987 (Ky.); Mueller v. St. Louis, etc. R. Co., 31 Mo. 262; Texas, etc. R. Co. v. White, 25 Tex. Civ. App. 278, 62 S. W. Rep. 133.

[4] Ward v. Warner, 8 Mich. 508–525.

[5] McWilliams v. Morgan, 75 Ill. 473; Weaver v. Mississippi & R. R. Boom Co., 28 Minn. 534, 11 N. W. Rep. 114; Houston, etc. R. Co. v. Adams, 63 Tex. 200; Baltimore & O. R. Co. v. Boyd, 67 Md. 32, 10 Atl. Rep. 315, 1 Am. St. 362. The text is quoted in De Camp v. Bullard, 159 N. Y. 450, 455, 54 N. E. Rep. 26.

[6] Martin v. Porter, 5 M. & W. 351; Jegon v. Vivian, L. R. 6 Ch. 742; Phillips v. Homfray, L. R. 6 Ch. 770. The second case cited has been approved of by the house of lords in Livingstone v. Raywards Coal Co., 5 App. Cas. 25.

uses the other's land for his own purposes, he ought to pay for such user; and that therefore, as to so much of the land as was covered with spoil, the value of the land for the purpose for which it was used ought to be taken into account, and that as to the rest of the land the measure of damages was the diminution of the value thereof to the plaintiff.[1] Where land [367] was let, but the right to the minerals remained in the landlord, who, however, could not get them without the tenant's consent, but who had, nevertheless, got them without it, it was held that as the tenant had an absolute veto, it was equal in value to that of the minerals, less so much money as would induce a third person to get them; in other words, the measure of damages against the landlord would be the net returns from the sales, less such a sum by way of profit as would induce a third person to undertake the enterprise.[2] The general rule which governs the court of claims in passing upon claims against the government for war damages is that the amounts allowed are limited to the extent of the benefit which the government received by the taking, not for the injury which the owner suffered.[3]

§ **1015. Damages for destruction of property.** All the facts and circumstances constituting or proximately connected with the trespass and tending to show its character and immediate consequences may be proved, both to show the amount necessary to a just compensation for the injury and the motive of the defendant, to enable the jury to determine whether the wrong is such that punitory damages should be given, and, if so, to what extent.[4] In the absence of facts warranting such damages the principle of compensation governs,[5] and to ascertain the amount the mode of proof must be adapted to the facts of each case. If the wrong consists in destroying some improvement on the property, not essential to its enjoyment and not appreciably affecting its value as a whole, or any special interest of the plaintiff therein, the damages may be estimated

[1] Whitwham v. Westminster Brymbo Coal & C. Co., [1896] 2 Ch. 538, affirming [1896] 1 Ch. 894.

[2] Attorney-General v. Tomline, 5 Ch. Div. 750; Mayne on Dam. 387.

[3] Presbyterian Church v. United States, 33 Ct. of Cls. 339.

[4] Day v. Holland, 15 Ore. 464, 15 Pac. Rep. 855.

[5] McCormack v. Showalter, 11 Ind. App. 98, 38 N. E. Rep. 875.

on the value of the thing destroyed or removed. Thus, the removal by the village authorities of a sidewalk which had been laid by the village at its own expense in front of the plaintiff's lot, and used there for two years, and kept in repair by the plaintiff, was a trespass, for which he recovered the value of the walk, down, at the time it was removed.[1] But where the trespass suspends or impairs the enjoyment of the premises compensation may be given on the basis of the rental value in the absence of any ground for special damages,[2] or in addition to such damages; and if the premises are put out of repair, the cost of repair will be an additional item, including interest on [368] the amount paid. Where the trespass was the removal of a fence it was held that the plaintiff was entitled to recover such sum as would, properly expended, restore the premises to the condition they were in before the interference of the defendant.[3] Where the gas fixtures in a hall used for theatrical purposes were removed and the furniture damaged the tenant was entitled to the same measure of compensation, and also to damages for consequential injuries, such as his inability to use the hall for entertainments already arranged for.[4] One who destroys a private irrigating ditch is liable for the difference in the value of the land belonging to the owner of the ditch without the ditch and with it.[5]

Where the unfinished house of the plaintiff, being built under contract, was injured and its completion delayed by the defendant's tortious act, the plaintiff was not only entitled to

[1] Rogers v. Randall, 29 Mich. 41; Kent County Agricultural Society v. Ide, 128 Mich. 423, 87 N. W. Rep. 369. See Clark v. St. Clair, etc. Ice Co., 24 Mich. 508.

[2] Oklahoma v. Hill, 6 Okl. 114, 149, 50 Pac. Rep. 244, citing the text.

It is not necessary to the recovery of such value that the party entitled thereto should have recovered possession; nor is the recovery limited to the time the action was brought, but may extend to the time of the verdict, notwithstanding a statute provides that the detriment caused by the wrongful occupation of real property is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages. Id.

[3] Marvin v. Pardee, 64 Barb. 353; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. Rep. 395, 58 Am. Rep. 556; Gwaltney v. Scottish Carolina Timber Co., 115 N. C. 579, 20 S. E. Rep. 465, quoting the text; Galveston, etc. R. Co. v. Chittim, 71 S. W. Rep. 294 (Tex. Ct. of Civ. App.).

[4] Willis v. Branch, 94 N. C. 142.

[5] Denver, etc. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322.

recover for the injury to the building, but also its rental value during the delay thus occasioned. The court say: "There was no valid objection to recovery by the plaintiff for the injuries to the dwelling-house. It was part of the realty and the property of the plaintiff. The fact that it was built by contract and was not completed did not detract from his right to the house as it was, or to recover for its destruction. A recovery by him would bar an action by the contractors, even if it be conceded they would have a remedy against the defendant. . . . But no legal objection exists to a recovery by the plaintiff for that which was clearly his, although he might have an action against a third person, who in turn would have a remedy over against the city."[1] If the thing destroyed, although it is part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery may be of the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction.[2] By value, in such a case, is meant the actual, not the market, value.[3] The real value of a building is to be ascertained by taking into account the original cost and the cost of replacing it, and making allowance for depreciation from use, age, and other like causes, as the condition in which it was required.[4] One who destroyed the sluiceway to a mill was held liable for the value of it and the consequential damages of the plaintiff for having his mill stopped.[5] In an action to recover for damages to a dam and fishtrap evidence of the annual output of the fishery is admissible to show the extent of the injury.[6] If for the purpose of staying a conflagration a building has been blown up

[1] Nims v. Troy, 59 N. Y. 508.

[2] Southern Oil Works v. Bickford, 14 Lea, 651; Houston, etc. R. Co. v. Adams, 63 Tex. 200; Marks v. Culmer, 6 Utah, 419, 24 Pac. Rep. 528; Whitbeck v. New York, etc. R. Co., 36 Barb. 647; Clark v. St. Clair, etc. Ice Co., 24 Mich. 508; McMahon v. Dubuque, 107 Iowa, 62, 77 N. W. Rep. 517, 70 Am. St. 143, quoting the text; Anderson v. Miller, 96 Tenn. 35, 43, 33 S. W. Rep. 615, 54 Am. St. 812, 31 L. R. A. 604; Galveston, etc. R. Co. v. Chittim, 71 S. W. Rep. 294 (Tex. Ct. of Civ. App.), quoting the text.

[3] McMahon v. Dubuque, *supra;* Wall v. Platt, 169 Mass. 398, 48 N. E. Rep. 270.

[4] Wall v. Platt, *supra.*

[5] Hammat v. Russ, 16 Me. 171; Hueston v. Mississippi & R. R. Boom Co., 76 Minn. 251, 79 N. W. Rep. 92.

[6] Gwaltney v. Scottish Carolina Timber Co., 115 N. C. 579, 20 S. E. Rep. 465.

[369] without right the jury in estimating the damages should consider the circumstances under which it and its contents were situated, and their chance of being saved, even though they were not actually on fire; and should determine their value with reference to the peril to which they were exposed.[1] In determining, under the Indian indemnity acts, the value of improvements put upon public lands and destroyed by Indians, account will be taken of the fact that the materials used in making the improvements were taken from such lands and that the improvements represented only the claimant's labor.[2]

§ 1016. Occupation of land by railroads. A railroad company which lays its track upon land, without acquiring the right to do so, is liable, in the absence of all claim for other damages, for the difference between the annual rental value of the premises with the track down and the road operated as it is, and what the rental value would have been if the road had not been there.[3] In estimating the rental value the entire premises of the plaintiff must be considered. He cannot show the rental value of the land occupied by the defendant in a street as disconnected from the land not in the street.[4] In Florida the owner of the fee in a street on which a railroad track is laid without compliance with the statute may recover for depreciation of the market or rental value of the abutting property, and for annoyances to his business or to his family.[5] The damages cannot be increased because property on land adjacent to land so occupied has been exposed to extra hazard from fire.[6] If consequential damage has been sustained as the result of the trespass compensation therefor is recoverable.[7]

[1] Parsons v. Pettingill, 11 Allen, 507.

[2] Osborn v. United States, 33 Ct. of Cls. 304.

[3] Blesch v. Chicago, etc. R. Co., 43 Wis. 183, 48 id. 168, 2 N. W. Rep. 113; Brakken v. Minneapolis, etc. R. Co., 29 Minn. 41, 11 N. W. Rep. 124, 31 Minn. 45, 16 N. W. Rep. 459; Carli v. Union Depot, etc. Co., 32 Minn. 101, 20 N. W. Rep. 89; Larsen v. Oregon R. & N. Co., 19 Ore. 240, 23 Pac. Rep. 974; Rumsey v. New York, etc. R. Co., 133 N. Y. 79, 30 N. E. Rep. 654, 28 Am. St. 600, 15 L. R. A. 618.

[4] Kenyon v. New York Central, etc. R. Co., 29 App. Div. 80, 51 N. Y. Supp. 386.

[5] Florida Southern R. Co. v. Brown, 23 Fla. 104, 1 So. Rep. 512; Jacksonville, etc. R. Co. v. Lockwood, 33 Fla. 573, 15 So. Rep. 327.

[6] Fore v. Western, etc. R. Co., 101 N. C. 526, 8 S. E. Rep. 335. See § 1066.

[7] Gulf, etc. R. Co. v. Richards, 11 Tex. Civ. App. 95, 107, 32 S. W. Rep. 96. This case rules in favor of the admissibility of evidence showing that stagnant water formed near

If a mill-race is so obstructed as to destroy the use of the mill the damages are measured by the difference between the value of the mill site and machinery before and after the obstruction was made.[1] In Mississippi the increased value of adjacent lands resulting from the construction of a railroad cannot affect the amount recoverable for the trespass.[2] The same rule was applied in North Carolina in a case which holds that the damages resulting from the negligent construction of a railroad are ascertainable by the difference in the value of the plaintiff's land with the road constructed as it was and what would have been its value had it been properly constructed.[3]

In some states the statutory rule for awarding damages in condemnation proceedings is applied in actions to recover compensation for unlawful entry, if neither special nor vindictive damages are claimed. The recovery is fixed by the value of the land appropriated on the day it was taken, to be increased or diminished as the value of the part not taken has been affected by the appropriation.[4] No separate account should be taken of the value of trees cut; their worth should be assessed with the land.[5] In Kentucky there may be a recovery for the value of the land taken, for the depreciation in the value of that not taken, and for the forcible entry or trespass.[6] In some cases the damages are measurable by the difference in the value of the plaintiff's property immediately before it became generally known that the road was to be built thereon and its value immediately after it was built.[7] The damages to property abutting on a street which is unauthorizedly occupied by a railroad company are the difference in its market value with and without the road, regardless of the fact that property along the line of the railroad has increased in value be-

the plaintiff's residence, and caused sickness in his family.

[1] Hot Springs R. Co. v. Tyler, 36 Ark. 205.

[2] Natchez, etc. R. Co. v. Currie, 62 Miss. 506.

[3] Carson v. Railroad, 128 N. C. 95, 38 S. E. Rep. 287.

[4] Texas, etc. R. Co. v. Matthews, 60 Tex. 215; Jones v. New Orleans & S. R. Co., 70 Ala. 227; Cowan v. Southern R. Co., 118 Ala. 354, 23 So. Rep. 54; Memphis, etc. R. Co. v. Organ, 67 Ark. 84, 55 S. W. Rep. 952; Chicago, etc. R. Co. v. O'Neill, 58 Neb. 239, 78 N. W. Rep. 521.

[5] Texas, etc. R. Co. v. Matthews, 60 Tex. 215.

[6] Pollock v. Maysville, etc. R. Co., 103 Ky. 84, 44 S. W. Rep. 359.

[7] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667; M. & B. S. R. Co. v. Connor, 16 Ky. L. Rep. 635, 29 S. W. Rep. 344.

cause of its construction.[1] The successor of a railroad company which unauthorizedly took land part of which was washed away before it came into possession of the successor is liable for the value of only so much as it received.[2]

The damages resulting from the destruction of a pass-way from one part of a farm to another part are not always confined to such as result to the value of the part made inaccessible to the owner. Where such a way was obstructed by debris the court instructed that the cost of the removal of the debris, if it did not exceed the value of the land, was the measure of damages; if it exceeded such cost and the land was destroyed, then its value would be recoverable, and that if any part of the pass-way was necessary to reach adjoining lands of the owner, the cost of opening such way over his land could be considered, or the cost of constructing a different way, if practicable and less expensive.[3] A trespassing railway company cannot lessen its liability for the depreciation in the market value of the property by proof that the ties and rails placed upon it became part of the realty and the property of the plaintiff.[4] If a single trespass is committed upon two contiguous lots owned by the plaintiff the damages to both may be assessed together, although they have not been so used as to be considered as one tract within the rule which governs in condemnation proceedings.[5] The rental or usable value of the property is to be determined with reference to the purpose it was used for before the wrong was done; not what such value would have been if the land had been devoted to some other use or if the improvements upon it were different.[6] In an action to restrain the operation in a street of an elevated railroad and to recover damages because of its operation, the loss of the easements of light, air and access are to be considered, and in estimating past damages the question of noise may be an element in the award. The damages and the compensa-

[1] Highland Avenue & B. R. Co. v. Matthews, 99 Ala. 24, 10 So. Rep. 267, 34 Cent. L. J. 267, 14 L. R. A. 462.

[2] Memphis, etc. R. Co. v. Organ, *supra*.

[3] Norfolk & W. R. Co. v. Carter, 91 Va. 587, 22 S. E. Rep. 517.

[4] Schroeder v. De Graff, 28 Minn. 299, 9 N. W. Rep. 857.

[5] Lamm v. Chicago, etc. R. Co., 45 Minn. 71, 47 N. W. Rep. 455, 18 L. R. A. 670.

[6] Rumsey v. New York, etc. R. Co., 133 N. Y. 79, 30 N. E. Rep. 654, 28 Am. St. 600, 15 L. R. A. 618. The same rule is applied in actions to recover for a nuisance. See § 1047.

tion are to be measured by the balance of injury over benefits, and in ascertaining them the advantages and the disadvantages are to be considered, and the benefits, whether general or special, from the construction and operation of the road, which tend to counterbalance the disadvantages, are to be taken into account.[1] In an action on the case against a street railroad company to recover damages for the unlawful occupation of a street, there cannot be a recovery of the costs and attorney's fees and for time used in and about a previous chancery suit involving the company's right to occupy the street. Such costs were related to that suit, and such of them as the law allows were presumably taxed therein. It was also improper to receive testimony to the effect that drays and teams could not stand at right angles with the sidewalk in front of the plaintiff's lot, because he has no inalienable right to have them so stand if public travel would thereby be interfered with.[2]

There is a marked diversity of opinion concerning the nature of a trespass by railroads occupying land. Some courts hold that the wrong is a continuing one, and that successive actions may be brought in which prospective damages cannot be recovered. This is the rule in Wisconsin,[3] Minnesota,[4] New York,[5] Pennsylvania,[6] Georgia[7] and Tennessee.[8] In Iowa,[9]

[1] Bischoff v. New York E. R. Co., 138 N. Y. 257, 33 N. E. Rep. 1073.

[2] Taylor v. Bay City Street R. Co., 101 Mich. 140, 59 N. W. Rep. 447, citing, to the last proposition, Hobart v. Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461.

[3] Carl v. Sheboygan, etc. R. Co., 46 Wis. 625, 1 N. W. Rep. 295.

[4] Brakken v. Minneapolis, etc. R. Co., 29 Minn. 41, 11 N. W. Rep. 124; Adams v. Hastings, etc. R. Co., 18 Minn. 260; Lamm v. Chicago, etc. R. Co., 45 id. 71, 47 N. W. Rep. 455, 18 L. R. A. 670.

In Hueston v. Mississippi & R. R. Boom Co., 76 Minn. 251, 79 N. W. Rep. 92, works maintained in a river

[5] Uline v. New York, etc. R. Co., 101 N. Y. 98, 4 N. E. Rep. 536, 54 Am. Rep. 661; Kenyon v. New York Central, etc. R. Co., 29 App. Div. 80, 51 N. Y. Supp. 386; Tallman v. Metropolitan E. R. Co., 121 N. Y. 119, 23 N. E. Rep. 1134, 8 L. R. A. 173; Mott v. Lewis, 52 App. Div. 558, 65 N. Y. Supp. 31.

[6] Bare v. Hoffman, 79 Pa. 71, 21 Am. Rep. 42. See O'Brien v. P. S. V. R. Co., 119 Pa. 184, 13 Atl. Rep. 74; Hankey v. Philadelphia Co., 5 Pa. Super. Ct. 148.

[7] Savannah, etc. R. Co. v. Bourquin, 51 Ga. 378; Allen v. Macon, etc. R. Co., 107 Ga. 838, 33 S. E. Rep. 696 (if the land is rendered permanently useless).

[8] Harmon v. Railroad, 87 Tenn. 614, 11 S. W. Rep. 703.

[9] Stodghill v. Chicago, etc. R. Co., 53 Iowa, 341, 5 N. W. Rep. 495.

Illinois,[1] Kentucky,[2] Massachusetts,[3] Kansas,[4] Indiana,[5] Texas,[6] New Hampshire,[7] Alabama,[8] Florida,[9] Nebraska[10] and the District of Columbia,[11] successive actions will not lie.

§ 1017. Damages for permanent wrong. Wherever, [372] by one act, a permanent injury is done the damages are assessed once for all,[12] even though separate parcels of land are affected,[13] and any depreciation in the value of the property will be an element of damages according to the extent and duration of the plaintiff's estate. An estimate of damages on this basis presupposes that the premises are subject to the same lasting detriment, and that it is not to be averted or removed by any expenditure; for otherwise the injury would be measured upon different elements.[14] Thus, where by the wrongful act of the defendant a bar of gravel was deposited upon the plaintiff's land by a flood, and was so extensive that the cost of its removal would equal or exceed the value

caused a log jam in April and again in July, which resulted in overflowing the lands of the plaintiff. Held, in the nature of a continuing trespass by the same act, and that all the damages sustained were recoverable in the same action.

[1] Chicago, etc. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. Rep. 460; Doane v. Lake Street E. R. Co., 165 Ill. 510, 46 N. E. Rep. 520, 56 Am. St. 265, 35 L. R. A. 588.

[2] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667.

[3] Fowle v. New Haven & N. Co., 112 Mass. 334, 17 Am. Rep. 106.

[4] Kansas R. Co. v. Milman, 17 Kan. 224.

[5] Indiana, etc. R. Co. v. Eberle, 110 Ind. 542, 11 N. E. Rep. 467, 59 Am. Rep. 225; Same v. Allen, 113 Ind. 308, 15 N. E. Rep. 451, 3 Am. St. 650.

[6] Rosenthal v. Taylor, etc. R. Co., 79 Tex. 325, 15 S. W. Rep. 268.

[7] Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

[8] Highland Avenue & B. R. Co. v. Matthews, 99 Ala. 24, 10 So. Rep. 267, 34 Cent. L. J. 158, 14 L. R. A. 462. The opinion in this case contains a discussion of the New York rule and the reasons upon which it is rested, and a satisfactory answer to the argument in favor of that rule.

[9] Jacksonville, etc. R. Co. v. Lockwood, 33 Fla. 573, 15 So. Rep. 327, disapproving Savannah, etc. R. Co. v. Davis, 25 Fla. 917, 7 So. Rep. 29.

[10] Chicago, etc. R. Co. v. O'Neill, 58 Neb. 239, 78 N. W. Rep. 521.

[11] District of Columbia v. Hutchinson, 1 D. C. App. Cas. 403.

[12] Ziebarth v. Nye, 42 Minn. 541, 44 N. W. Rep. 1027; Lamb v. Walker, 3 Q. B. Div. 389. See Mitchell v. Darley Main Collery Co., 14 id. 125; Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127, and other cases considered in §§ 114–116; Chicago & A. R. Co. v. Robbins, 159 Ill. 598, 43 N. E. Rep. 332; Redemptionists v. Wenig, 79 Md. 348, 29 Atl. Rep. 667.

[13] Beronio v. Southern Pacific R. Co., 86 Cal. 415, 24 Pac. Rep. 1093, 21 Am. St. 57.

[14] Doss v. Billington, 98 Tenn. 375, 39 S. W. Rep. 717, quoting the text.

thereby restored to the premises, that expense was held not to measure the damages; but rather the depreciation in the value of the land in consequence of the deposit remaining.[1] In ascertaining the lessened value of a lot it is not competent to consider separately the value of a house thereon which has not been injured. The plaintiff cannot increase his recovery beyond the diminished value of the lot by proving the cost of removing the earth and building a retaining wall to prevent other earth not on his land from falling thereon.[2] So where the plaintiff's land is caused to fall away in consequence of the de- [373] fendant's removing its lateral support, he is entitled to damages to the extent of the injuries sustained; this is not, however, the cost of restoring the lot to its former condition or of building a wall to support it, but it is the diminution in the value of the land in consequence of the defendant's act.[3] It is a

[1] Easterbrook v. Erie R. Co., 51 Barb. 94; Chase v. New York, etc. R. Co., 24 id. 273; Hanover Water Co. v. Ashland Iron Co., 84 Pa. 279; Jones v. Gooday, 8 M. & W. 146; Honsee v. Hammond, 39 Barb. 89; De Coster v. Massachusetts Mining Co., 17 Cal. 613; Holt v. Sargent, 15 Gray, 97; Chicago, etc. R. Co. v. Willits, 45 Kan. 110, 25 Pac. Rep. 576.

The rule as stated was recognized in Koch v. Sackman-Phillips Investment Co., 9 Wash. 405, 37 Pac. Rep. 705, as being applicable where the injured premises are considered as land only; but it was said that where the injury consists in large part of the loss of fences, walks, out-houses, trees and shrubbery upon city residence premises, it is not always applicable because it may not afford compensation for the injury.

It has been applied where subterranean water has been pumped to such an extent as to permanently and injuriously affect land. Reisert v. New York, 35 N. Y. Misc. 413, 71 N. Y. Supp. 965. See Forbell v. New York, 164 N. Y. 522, 58 N. E. Rep. 644.

In New York there cannot be a recovery on the basis of the diminished value of the land on which dirt is piled because it cannot be assumed that the trespass will be permanent. Mott v. Lewis, 52 App. Div. 558, 65 N. Y. Supp. 31.

The measure of damages there, for filling vacant lots above grade, is their rental value during the period of the continuation of the trespass. Eno v. Christ, 25 N. Y. Misc. 24, 54 N. Y. Supp. 400.

The same measure of liability exists where damage has been caused by the burning of grass on land. Gulf, etc. R. Co. v. Cusenberry, 5 Tex. Civ. App. 114, 23 S. W. Rep. 851, and local cases cited; Missouri, etc. R. Co. v. Goode, 7 Tex. Civ. App. 245, 26 S. W. Rep. 441; Chicago & E. R. Co. v. Smith, 6 Ind. App. 262, 33 N. E. Rep. 241; Atchison, etc. R. Co. v. Briggs, 2 Kan. App. 154, 43 Pac. Rep. 289; Terre Haute & L. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. Rep. 534; Baltimore & O. R. Co. v. Countryman, 16 Ind. App. 139, 44 N. E. Rep. 265.

[2] Nelson v. West Duluth, 55 Minn. 497, 57 N. W. Rep. 149.

[3] McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Gilmore v. Driscoll,

damage from loss of soil; and where by any tortious act such a loss occurs the owner is entitled to be compensated according to the value of the land or soil to him.[1] If its removal reduces the value of the lot he is entitled to recover for such depreciation.[2] This measure of damages was applied where property suitable for the site of large buildings was undermined, and the proof tended to show that by the construction of foundation walls of unusual depth, which would cost less than the amount of the diminution in the market value of the property, the surface might be retained in its natural condition and safe support for such buildings afforded. The court thought that the land-owner was not bound to resort to that means to avert loss; he had the right to hold the property for sale and realize its market value. If that value had been diminished to a greater extent than the cost of building such walls the application of that cost as the measure of recovery would not afford full compensation unless the plaintiff should resort to the erection of such buildings as the property was suitable for.[3] Where a wall encroached upon the land of an adjoining owner and stones from it continually fell upon such land the damages were measured by the depreciation in its value and not by charging the defendant with the value of the land at the place in question. The plaintiff was also entitled to recover the loss sustained by the removal of tenants and the inability to obtain others by reason of the location of the wall.[4]

The doctrine of lateral support and the measure of damages for injury thereto does not apply to deep mining claims in California which are worked by the hydraulic process. Hence, where the parties owned adjoining claims and the defendant in working its own washed away the gravel so that a portion

122 Mass. 199, 23 Am. Rep. 312; Nicklin v. Williams, 10 Ex. 259; Moellering v. Evans, 121 Ind. 195, 22 N. E. Rep. 989; Kopp v. Northern Pacific R. Co., 41 Minn. 310, 43 N. W. Rep. 73.

The last case holds that evidence of the cost of retaining walls is proper to show whether or not the damage could have been repaired and the lot preserved at reasonable cost. See § 1053.

[1] Jones v. Gooday, 8 M. & W. 146; Mueller v. St. Louis, etc. R. Co., 31 Mo. 262.

[2] Karst v. St. Paul, etc. R. Co., 22 Minn. 118.

[3] Barnett v. St. Anthony Falls Water Power Co., 33 Minn. 265, 22 N. W. Rep. 535.

[4] Goldschmid v. Mayor, 14 App. Div. 135, 43 N. Y. Supp. 447, citing this section.

of plaintiff's land fell upon the other's claim and was washed away, the value of the gold in the portion which fell, being less than the necessary cost of securing it, there was no liability.[1] If the depreciation in market value measures the liability of the wrong-doer the entire tract of land upon which the injury was done is to be considered, although but a small portion of it has been directly and physically affected.[2] The market value of the tract may be shown for any purpose for which it could be most advantageously used and for which it would command the highest price.[3] Where an action was brought for injury to the life estate of the plaintiff as tenant by the curtesy initiate, it was held erroneous to assess the value of the estate by the present value of the rents and profits, without deduction for annual charges or rebate of interest.[4] If a large quantity of earth is placed upon the land the benefits resulting to the latter may be considered under a general denial. An allowance therefor is not in the nature of recoupment or set-off, but a method of determining the damage sustained.[5] Where the injury complained of consists in the erection of a telephone pole in a footway in front of the plaintiff's premises, no land of his being actually taken nor any of his soil being invaded, the damage is measured either by the extent of the depreciation in the usable or rental value of the property, or by the difference in its value before and after such erection so far as the value has been affected by that act.[6]

The liability for the destruction of a private right of way extends to the losses suffered by the destruction of crops and

[1] Hendricks v. Spring Valley Mining & S. Co., 58 Cal. 190, 41 Am. Rep. 257.

[2] Chicago, etc. R. Co. v. Willits, 45 Kan. 110, 25 Pac. Rep. 576.

[3] Id. Where the construction of a railroad cut off the owner's access to a navigable river forming a boundary to his land he was not limited to proof of its rental value as it was used when the obstruction was made, but could show its fair rental value without the obstruction, and the condition the land was in to lease for a purpose for which it was adapted, though it was not leased at that time. Ramsey v. New York, etc. R. Co., 136 N. Y. 543, 32 N. E. Rep. 979, distinguishing S. C., 133 N. Y. 79, 30 N. E. Rep. 654, 15 L. R. A. 618; Tallman v. Metropolitan E. R. Co., 131 N. Y. 119, 23 N. E. Rep. 1134, 8 L. R. A. 173.

[4] Greer v. Mayor, etc., 1 Abb. Pr. (N. S.) 206.

[5] Mayo v. Springfield, 138 Mass. 70; Koch v. Sackman-Phillips Investment Co., 9 Wash. 405, 37 Pac. Rep. 703.

[6] Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. Rep. 690.

the diminished value of the land.[1] The removal of gravel from land entitles the owner to recover its value *in situ* and such other damages to the land as the taking caused. In determining the value of the gravel it is proper to prove any purpose for which it could be used.[2] No allowance will be made the defendant for any resulting benefit to the land made through bringing it to grade. If the plaintiff had sold the soil which the defendant removed he would have received its value, and have had the resulting benefit of grading besides. The rule which governs when an addition is made to property has no application in such a case.[3] In the absence of any permanent injury done to land by the trespass, depreciation in its market value, which could have been effected by a variety of causes, is not the measure of damages, though it may be considered in connection with other evidence tending to show the injury done by the trespass.[4]

§ 1018. Damages where injury remediable. If the wrong consists in the destruction or removal of some addition, fixture or part of the premises the loss may be estimated upon the diminution of their value if any results,[5] or upon the value of the part severed considered either as a part of the premises or detached; and that valuation should be adopted which will be most beneficial to the injured party, for he is entitled to the benefit of the premises intact and to the value of any part separated.[6] The damages for injuries to buildings and fences

[1] Redemptionists v. Wenig, 79 Md. 348, 29 Atl. Rep. 667.

[2] Illinois Central R. Co. v. Le Blanc, 74 Miss. 626, 21 So. Rep. 760; Patterson v. Waldman, 20 Ky. L. Rep. 514, 46 S. W. Rep. 17; District of Columbia v. Robinson, 14 D. C. App. Cas. 512, 547; Providence & W. R. v. Worcester, 155 Mass. 35, 29 N. E. Rep. 56; Handforth v. Maynard, 154 Mass. 414, 28 N. E. Rep. 348.

[3] Williams v. Hathaway, 21 R. I. 566, 45 Atl. Rep. 578.

[4] Abercrombie v. Windham, 127 Ala. 179, 28 So. Rep. 387.

[5] Rhoda v. Alameda County, 58 Cal. 357; Oregon & C. R. Co. v. Jackson, 21 Ore. 360, 28 Pac. Rep. 74; Burtraw v. Clark, 103 Mich. 383, 61 N. W. Rep. 552; Hueston v. Mississippi & Rum River Boom Co., 76 Minn. 251, 79 N. W. Rep. 92; Millard v. Webster City, 113 Iowa, 220, 84 N. W. Rep. 1044; Brown v. Same, 115 Iowa, 511, 88 N. W. Rep. 1070; Sweeny v. Montana Central R. Co., 25 Mont. 543, 65 Pac. Rep. 912. See Bailey v. Siegel Gas Fixture Co., 54 Mo. App. 50.

[6] Gilman v. Brown, 115 Wis. 1, 91 N. W. Rep. 227; Hoyt v. Southern, etc. Tel. Co., 60 Conn, 385, 390, 22 Atl. Rep. 957, quoting and approving the text, and holding that an estimate of the damages resulting from the probable injury to the sale of a

are measured by the cost of restoring them to their previous condition;[1] for encroaching upon land the value of its use for past time.[2] When occasion requires it the rule is generally announced to be that when the reasonable cost of repairing the injury by restoring the premises is less than the damage done, such cost measures the damages; but if the cost of restoration is more than the diminished value the latter generally determines the amount of the recovery.[3] Where a pipe supplying plaintiff with water was cut on the defendant's premises the cost of obtaining water and compensation for the inconvenience endured measured the defendant's liability.[4] If

lot by cutting a shade tree in front of it was not speculative or remote; Fitz Simons & C. Co. v. Braun, 199 Ill. 390, 398, 65 N. E. Rep. 249, quoting the text; Baker v. Mims, 14 Tex. Civ. App. 413, 37 S. W. Rep. 190, quoting the two preceding propositions and saying that the rules of law are correctly stated; Matthews v. Missouri Pacific R. Co., 142 Mo. 645, 664, 44 S. W. Rep. 802. Compare Burtraw v. Clark, 103 Mich. 383, 61 N. W. Rep. 552.

In Reisert v. City of New York, 69 App. Div. 302, 74 N. Y. Supp. 673, it is laid down that if there is more than one mode of assessing damages that which is most definite and certain should be adopted if the compensation thereby made will not be grossly inadequate, though it may not be full.

[1] Harrison v. Kiser, 79 Ga. 588, 595, 4 S. E. Rep. 320; Childs v. O'Leary, 174 Mass. 111, 116, 54 N. E. Rep. 490; Consolidated Gas Co. v. Getty, 96 Md. 683, 54 Atl. Rep. 660; Central R. & B. Co. v. Murray, 93 Ga. 256, 20 S. E. Rep. 129; Bailey v. Chicago, etc. R. Co., 3 S. D. 531, 19 L. R. A. 653, 54 N. W. Rep. 596, citing the text; Fitz Simons & C. Co. v. Braun, 199 Ill. 390, 65 N. E. Rep. 249; Shreves v. Stokes, 8 B. Mon. 453; Hide v. Thornborough, 2 C. & K. 250, 61 Eng. C. L. 250.

Forcibly entering a dwelling and murdering therein a servant of the owner does not warrant a recovery of the value of the premises on the theory that the plaintiff's family abandoned and refused to live in the house, in consequence of which it became worthless. Clark v. Gay, 112 Ga. 777, 38 S. E. Rep. 81.

Under a complaint alleging damage by reason of breaking in and destroying glass to the value of a sum stated, the recovery should not include the expense of putting the glass in the building. Fidelity & Casualty Co. v. Seattle, 16 Wash. 445, 47 Pac. Rep. 963.

[2] Smith v. Kansas City, 138 Mo. 23, 30 S. W. Rep. 314; Topeka v. Martineau, 42 Kan. 388, 22 Pac. Rep. 419, 5 L. R. A. 775. See § 1048.

[3] McGann v. Hamilton, 58 Conn. 69, 19 Atl. Rep. 376.

[4] Reynolds v. Braithwaite, 131 Pa. 416, 18 Atl. Rep. 1110. See Miller v. Rambo, 66 N. J. L. 191, 49 Atl. Rep. 453.

Where a pipe laid in a highway was used to conduct salt water, some of which was discharged through the earth on the premises of the plaintiff, he was entitled to recover the loss in their rental value, and if trees or shrubs on his premises were injured he could also recover on account thereof. There was no pre-

trees are cut so as to fall across a line fence and cover a portion of the land with brush the damages are not necessarily measured either by the expense of removing them or the value of the land they cover, because the injury may have extended to other land than that covered.[1] In a recent Iowa case the defendant entered upon and dug trenches and laid pipes through plaintiff's lot, thereby injuring his fences, walks, trees, shrubbery and house. It was assumed that these injuries could be repaired, and held that the damages were measured by such sum as would put the property in as good condition as it was in before the injury, with the additional sum that would compensate for the deprivation of its use and enjoyment and the value of such of the property as could not be restored to its previous condition.[2] The cost of filling a drain and the damage resulting from the loss of the use of the land measured the liability of the person who dug the drain.[3] One who owns premises abutting upon a street, and who is primarily liable for the construction and maintenance of a sidewalk in front thereof, may recover for an injury to the walk to the extent of the cost of repairing or rebuilding it.[4]

sumption that the existing state would continue, and damages could be recovered only to the time of the trial. Hartman v. Tully Pipe Line Co., 71 Hun, 367, 25 N. Y. Supp. 24.

In an action by a vendee against his vendor to compel the repair of pipes which conducted water to a fish pond on the premises conveyed and to recover the damages sustained up to the time of the trial for wrongful interference with such pipes, there could not be a recovery of damages on account of depreciation in the value of the fee, but only of the proximate loss sustained up to the trial. Spencer v. Kilmer, 151 N. Y. 390, 45 N. E. Rep. 865.

[1] Hutchinson v. Parker, 64 N. H. 89, 5 Atl. Rep. 659.

[2] Graessle v. Carpenter, 70 Iowa, 166, 30 N. W. Rep. 392; Lentz v. Carnegie, 145 Pa. 612, 23 Atl. Rep. 219, 27 Am. St. 717; Sweeny v. Montana Central R. Co., 25 Mont. 543, 65 Pac. Rep. 912.

[3] Walters v. Chamberlain, 65 Mich. 333, 32 N. W. Rep. 440; Cavanagh v. Durgin, 156 Mass. 466, 31 N. E. Rep. 643. See Ziebarth v. Nye, 42 Minn. 541, 44 N. W. Rep. 1027; Doss v. Billington, 98 Tenn. 375, 39 S. W. Rep. 717.

Where the plaintiff had taken no steps towards filling a drain dug on his land, it was competent for the defendant to show that the land was benefited by the drain. If that was the fact the damages could not exceed the diminution in the value of the land by reason of the digging of the drain; but if the fact was otherwise and it was found that the plaintiff intended to fill the drain, the cost of doing so might be recovered, that cost not exceeding the value of the land. Burtraw v. Clark, 103 Mich. 383, 61 N. W. Rep. 552, 107 Mich. 333, 65 N. W. Rep. 218.

[4] Parish v. Baird, 160 N. Y. 302, 54 N. E. Rep. 724, citing this section.

A lower riparian proprietor from whose land water has been diverted by the upper owner may recover the expense incurred in order to obtain water to take the place of that he was entitled to.[1] If that is impracticable in part the recovery, in case of the diversion of water from pasture lands, may include the expense incurred in watering stock, the injury thereto, loss of quantity and quality of milk and injury to the pasture.[2] If a trespass results in preventing the leasing of property, the loss of the rental value may be recovered.[3] The damages recoverable against a trespasser for using a private way, no interference with the full use of it by the owner being shown, are based on the injury done to the way or to the land, including any increase occasioned thereby in the cost of making repairs.[4] Where logs are cast on land, the land-owner may recover for the damage caused by their remaining there an unreasonable length of time and that done by removing them, if he was not responsible for their so remaining.[5] Where a new channel was made which changed the course of a stream running through the plaintiff's land, it was proper to receive evidence showing that the stream, subsequent to the trespass, overflowed the channel made for it, such evidence being competent to prove the difference in the market value of the premises before and after the trespass. It was not proper to use such evidence as an independent ground of damage.[6]

Liability for loss of the use does not extend over the period occupied in the determination of a suit against a party who is not liable for the wrong.[7] The Pennsylvania court has held that a comparison of the value of the property injured cannot antedate the period which bars the right to bring an action for the wrong done.[8] In an action by the owner of agricult-

[1] Standard Plate Glass Co. v. Butler Water Co., 7 Pa. Super. Ct. 563; Irving v. Media, 10 id. 132, affirmed on the opinion of the superior court, 194 Pa. 648.

[2] Craig v. Shippensburg, 11 Pa. Super. Ct. 490.

[3] Wall v. Pittsburgh Harbor Co., 152 Pa. 427, 25 Atl. Rep. 647, 34 Am St. 667.

[4] Johnson v. Arnold, 91 Ga. 659, 18 S. E. Rep. 370.

[5] Ford Lumber & Manuf. Co. v, McQueen, 14 Ky. L. Rep. 521 (Ky. Super. Ct.).

[6] Sweeny v. Montana Central R. Co., 19 Mont. 163, 47 Pac. Rep. 791.

[7] Cavanagh v. Durgin, 156 Mass. 466, 31 N. E. Rep. 643.

[8] Lentz v. Carnegie, 145 Pa. 612, 23 Atl. Rep. 219, 27 Am. St. 717.

ural land to obtain equitable interposition to prevent a continuing trespass by a city in withdrawing subterranean waters from his land by means of driven wells, the measure of damages is the decreased fee or rental value of the property. The owner cannot recover damages resulting from the loss of a crop if he knew before it was sown that a different crop would have yielded a good return.[1] This rule is not limited to damages for the loss of anticipated crops, but applies to those lost before the action was begun.[2] Where the defendant threw dirt upon the plaintiff's lot, thereby increasing the expense of excavating for the purpose of building thereon and making it necessary for the plaintiff to construct a wall to prevent dirt placed on the defendant's lot from falling upon his own, the expense of doing the latter and the increased expense of building were proper subjects of proof, though such expense did not necessarily measure the damages.[3]

§ 1019. Liability for cutting trees and mining ores. For cutting and carrying away trees or timber by a continuous act the action must be trespass *quare clausum fregit*.[4] Under that form of action the severance of the property from the freehold is the essential fact, and so far as it diminishes the value of the land the owner is entitled to compensation. The value of the timber need not be averred, but may be proved to show the amount of damages,[5] as may the value of fruit raised where an orchard has been destroyed.[6] The plaintiff may adopt the value of the timber as the measure of his damages, but is not obliged to do so;[7] if the injury to the land ex- [374] ceeds the value of the timber or, in other words, if the trees were worth more standing, he may recover their value

[1] Westphal v. City of New York, 75 App. Div. 252, 78 N. Y. Supp. 56.

[2] Kinsey v. City of New York, 75 App. Div. 262, 78 N. Y. Supp. 160.

[3] McKnight v. Denny, 198 Pa. 323, 47 Atl. Rep. 970.

[4] Sturgis v. Warren, 11 Vt. 433; White v. Yawkey, 108 Ala. 270, 19 So. Rep. 360, 54 Am. St. 159, 32 L. R. A. 199.

[5] Kolb v. Bankhead, 18 Tex. 229.

[6] Krejci v. Chicago, etc. R. Co., —— Iowa, ——, 90 N. W. Rep. 708.

[7] Kolb v. Bankhead, *supra;* Bailey v. Chicago, etc. R. Co., 3 S. D. 531, 54 N. W. Rep. 596, 19 L. R. A. 653.

A joint owner of land who cuts and removes trees therefrom, without doing any other injury thereto, is not liable *ex delicto*, but *ex quasi contractu;* his liability is measured by the value of the trees when taken at the stump. Patureau v. Wilbert, 44 La. Ann. 355, 10 So. Rep. 782.

as part of the land.[1] Hogeboom, J., forcibly said: "Surely the damage would not be in all cases accurately measured by the market value of the wood or timber when cut. The trees might be a highly valuable appendage to the farm for purposes of shade or ornament; there might be a very scanty supply for a farm of that size; or for other reasons they might have a special value as connected with the farm, altogether independent of, and superior to, their intrinsic value for purposes of building or fuel. As well might you remove the columns which supported the roof or some part of the superstructure of a splendid mansion, and limit the owner in damages to the value of these columns as timber or cord wood as to adopt the parallel rule in this case."[2] The damages for the loss of trees are not to be estimated solely with reference to the tract of land on which they were growing, that being a part of the farm of the plaintiff, though the tract was separated from the remainder of the farm by a railroad. It was observed by the writer of the opinion that each part of the farm appears to have sustained some relation to the other part. The grove, doubtless, was designed to make the farm

[1] Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151; Krejci v. Chicago, etc. R. Co., — Iowa, —. 90 N. W. Rep. 708; Dent v. South Bound R., 61 S. C. 329, 39 S. E. Rep. 527; Chicago, etc. R. Co. v. Brown, 157 Ind. 544, 60 N. E. Rep. 346; Wallace v. Goodall, 18 N. H. 439; Ensley v. Nashville, 2 Baxter, 144; Templemore v. Moore, 15 Irish C. L. (N. S.) 14; Argotsinger v. Vines, 82 N. Y. 308; Nixon v. Stillwell, 52 Hun, 353, 5 N. Y. Supp. 248; Chipman v. Hibberd, 6 Cal. 162; White v. Stoner, 18 Mo. App. 540; Knisely v. Hire, 2 Ind. App. 86, 28 N. E. Rep. 195; Carner v. Chicago, etc. R. Co., 43 Minn. 375, 45 N. W. Rep. 713; Hayes v. Chicago, etc. R. Co., 45 Minn. 17, 47 N. W. Rep. 260; Disbrow v. Westchester Hardwood Co., 164 N. Y. 415, 58 N. E. Rep. 519; Meehan v. Edwards, 92 Ky. 574, 18 S. W. Rep. 519; Marshall v. American Tel. & Telephone Co., 16 Pa. Super. Ct. 615; Baylor v. Stephens, id. 365; Missouri Pacific R. Co. v. Tipton, 61 Neb. 49, 84 N. W. Rep. 416; Kansas City, etc. R. Co. v. Perry, 65 Kan. 792, 70 Pac. Rep. 876; Tyler Southeastern R. Co. v. Hitchins, 26 Tex. Civ. App. 400, 63 S. W. Rep. 1069; Greenfield v. Chicago & N. R. Co., 83 Iowa, 270, 49 N. W. Rep. 95; Burdick v. Chicago, etc. R. Co., 87 Iowa, 384. 54 N. W. Rep. 439; McCruden v. Rochester R. Co., 5 N. Y. Misc. 59, 25 N. Y. Supp. 114; Oregon & C. R. Co. v. Jackson, 21 Ore. 360, 28 Pac. Rep. 74; Bailey v. Chicago, etc. R. Co., *supra;* Warrior Coal & Coke Co. v. Mabel Mining Co., 112 Ala. 624, 20 So. Rep. 918; St. Louis, etc. R. Co. v. Ayres, 62 Ark. 371, 55 S. W. Rep. 159. Compare Fremont, etc. R. Co. v. Crum, 30 Neb. 70, 46 N. W. Rep. 217.

[2] Van Deusen v. Young, 29 Barb. 9.

more habitable. If it had any value we infer it consisted principally in the fact that it furnished shade and was a windbreak, and perhaps was ornamental, and so added somewhat to the value of the farm in its entirety.[1]

In Georgia the destruction of growing timber, much of it young and immature, as the result of negligence, no depreciation in the market value of the land being shown, involves liability for the value of the timber as and where it was just before its destruction. That value is ascertainable by evidence as to what the owner could have realized from the timber by appropriating it to his own use to the extent of any occasion he had for it at and about the time of its loss, and by selling it. Timber which was injured, but not destroyed, is to be dealt with on the same basis, to the extent of the difference between its value before its injury and afterward.[2] In Nebraska the damages for the destruction of trees are not measured by the depreciation in the value of the land in consequence thereof, but by the injury suffered by the timber.[3] This rule applies as well to trees which have been planted and cultivated as to those of natural growth.[4] The inquiry should be as to the value of the trees as standing timber, and not their market value for transplantation as shade or ornamental trees.[5] In Michigan if the testimony shows the value of the land before and after the timber thereon was cut, the damages may be measured by the depreciation in the value of the land notwithstanding its value consisted exclusively in the timber. The value of the stumpage may be considered, but it is not conclusive as to the amount of the recovery.[6] The intermediate court of Kansas approved the general rule that the value of trees, as part of the land, is the measure of liability for their destruction.[7] But in an action to recover for the loss of trees, shrubs and vines the defendant objected to testimony concerning their value as part of the

[1] Brooks v. Chicago, etc. R. Co., 73 Iowa, 179, 49 N. W. Rep. 97, approved in Rowe v. Chicago & N. R. Co., 102 Iowa, 286, 71 N. W. Rep. 409.

[2] Central R. & B. Co. v. Murray, 93 Ga. 256, 20 S. E. Rep. 129.

[3] Fremont, etc. R. Co. v. Crum, 30 Neb. 70, 46 N. W. Rep. 217.

[4] Kansas City & O. R. Co. v. Rogers, 48 Neb. 653, 67 N. W. Rep. 602.

[5] Fremont, etc. R. Co. v. Crum, *supra*.

[6] Gates v. Comstock, 113 Mich. 127, 71 N. W. Rep. 515.

[7] Missouri Pacific R. Co. v. Haynes, 1 Kan. App. 586, 42 Pac. Rep. 259; St. Louis, etc. R. Co. v. Hoover, 3 Kan. App. 577, 43 Pac. Rep. 854.

freehold because it would allow the witnesses to fix the plaintiff's damages. It was contended that the testimony should have been confined to the value of the farm as a whole before and after the injury. The supreme court said: While this is undoubtedly the regular and proper method of arriving at such damages as cannot be itemized and definitely measured in detail, it does not preclude the use of the best evidence which the nature of the case affords. Where a thing, whether it be a building, a tree or shrub, is destroyed by a wrong-doer, the most natural and best measure of the damage is the value of the thing destroyed as an appurtenant to, or part of, the realty; and ordinarily the value of the thing destroyed would be the measure of the injury to the freehold. If for any reason the injury to the realty should be in fact less than the value of the thing destroyed, the plaintiff's recovery would be limited to the actual diminution in value of the realty.[1]

The plaintiff in an action for trespass on land in cutting and carrying away timber is entitled, first, to recover damages for the injury to the land in severing the growing timber, considering merely the act of severing it; and secondly, for the taking and carrying away the timber so severed.[2] Though the whole is but one continuous act it includes this twofold injury.[3] In some instances, however, the cutting of the trees would be the whole injury, as where ornamental trees or fruit trees are cut.[4] In the case of the latter their value, according to some

[1] Missouri, etc. R. Co. v. Lycan, 57 Kan. 635, 47 Pac. Rep. 526; Wichita Gas, etc. Co. v. Wright, 9 Kan. App. 730, 59 Pac. Rep. 1085.

[2] Van Deusen v. Young, *supra;* Longfellow v. Quimby, 33 Mo. 457; Thompson v. Moiles, 46 Mich. 42, 8 N. W. Rep. 577; Miller v. Wellman, 75 Mich. 353, 42 N. W. Rep. 843; Dwight v. Elmira, etc. R. Co., 132 N. Y. 199, 30 N. E. Rep. 398, 28 Am. St. 563, 15 L. R. A. 612.

[3] In Smith v. Smith, 50 N. H. 218, the court say: The common mode of declaring in actions for breaking the plaintiff's close and taking and carrying away property "virtually includes two causes of action in one count — an action for the disturbance of plaintiff's possession of his real estate, and an action to recover the value of his chattels unlawfully taken and converted." Woolley v. Carter, 7 N. J. L. 85; Thayer v. Sherlock, 4 Mich. 173.

The damages for cutting and carrying away timber may be recovered without being specially alleged. Argotsinger v. Vines, 82 N. Y. 308.

[4] Whitbeck v. New York, etc. R. Co., 36 Barb. 644; Tissot v. Great Southern Tel. & T. Co., 39 La. Ann. 996, 4 Am. St. 248, 3 So. Rep. 261; Ross v. Scott, 15 Lea, 479; Norfolk & W. R. Co. v. Bohannon, 85 Va. 293, 7 S. E. Rep. 236; United States v. Taylor, 35 Fed. Rep. 484.

authorities, is to be estimated at their worth in their growing state;[1] but it is settled in New York that where fruit trees are destroyed or injured and their owner asserts his right to go beyond their value after severance from the land, so as to obtain compensation for the damage done the latter, his recovery is measured by the difference between the value of the land before and after the injury.[2] This measure of liability is recognized in Illinois,[3] Indiana,[4] and Iowa,[5] and is applied to hedges in the latter.[6] The damages for injury to nursery trees are measured by the depreciation in their market value.[7] The tortious act in these cases is one of destruction merely. On the other hand, if timber trees are cut after they have reached maturity, and the plaintiff, by getting their present market value, will realize all that he could ever obtain from them, the conversion of the timber is the principal injury. If that constitutes the whole injury the value of the timber will measure the damages.[8] If ores are mined and removed a like injury is [375] done; and the same considerations apply in the determination of damages. The value of timber cut may be recovered, although the plaintiff by mistake led the defendant to believe that he was cutting it on his own land.[9] But if there has been

[1] Montgomery v. Locke, 72 Cal. 75, 13 Pac. Rep. 401; Gilman v. Brown, 115 Wis. 1, 91 N. W. Rep. 227, citing the text; Mitchell v. Billingsley, 17 Ala. 391.

Under a contract providing that if fruit trees on land should be destroyed the owner should be paid their reasonable value, there cannot be a recovery based on the difference between the value of the land with and without the trees, but only of the value of the trees as such. Cooley v. Kansas City, etc. R. Co., 149 Mo. 487, 51 S. W. Rep. 101.

[2] Dwight v. Elmira, etc. R. Co., 132 N. Y. 199, 28 Am. St. 563, 15 L. R. A. 612, 30 N. E. Rep. 398; Haskell v. Northern Adirondack Co., 74 Hun, 380, 26 N. Y. Supp. 595; Carter v. Pitcher, 87 Hun, 580, 34 N. Y. Supp. 549.

The text is quoted in Shearer v. Park Nursery Co., 103 Cal. 415, 420, 37 Pac. Rep. 412, 42 Am. St. 125, and the rule stated applied in an action for the breach of warranty as to the quality of fruit trees.

[3] Louisville, etc. R. Co. v. Spencer, 149 Ill. 97, 36 N. E. Rep. 91, 47 Ill. App. 503; Chicago & A. R. Co. v. Davis, 74 Ill. App. 595; Cleveland, etc. R. Co. v. Stephens, id. 586.

[4] Chicago & E. R. Co. v. Kern, 9 Ind. App. 505, 36 N. E. Rep. 381.

[5] Rowe v. Chicago & N. R. Co., 102 Iowa, 286, 71 N. W. Rep. 409.

[6] Bradley v. Iowa Central R. Co., 111 Iowa, 562, 82 N. W. Rep. 996.

[7] Birket v. Williams, 30 Ill. App. 451; Dwight v. Elmira, etc. R. Co., 132 N. Y. 199, 30 N. E. Rep. 398, 28 Am. St. 563, 15 L. R. A. 612.

[8] Disbrow v. Westchester Hardwood Co., 164 N. Y. 415, 58 N. E. Rep. 519.

[9] Pearson v. Inlow, 20 Mo. 322, 64

a recovery for the injury done to the freehold by cutting trees there cannot also be a recovery for the value of the timber cut.[1] A trespasser, though he has acted in good faith, cannot, after the recapture of some of the logs cut by him, set up as against their owner a claim for the increase in their value by reason of their having been transported to a better market, nor can he, in an action by such owner for damages for cutting other logs, recoup for the additional value imparted by him to the logs so recaptured.[2] Where a tract of timber was partially destroyed by means of a fire, some being injured so that the cost of cutting it was increased, the damages were determinable by the value of the standing timber destroyed and the increased cost of cutting that injured. The plaintiff was not bound to cut the latter immediately after the fire, but might recover the cost of cutting it any time before the action was brought.[3]

§ **1020. Same subject; when value computed.** On the strict theory of trespass *quare clausum* the breaking of the close is the cause of action, and the removal of timber or other property merely enhances the damages. This is especially so if the severance from the land and the carrying away are by a continuous act. In any case where the severance is not the principal injury, where the conversion into a chattel and the carrying away are together complained of as the cause or causes of action, and the damages are ascertained on the value of the timber or ore, the actual injury is that the defendant has taken the plaintiff's property in the condition in which it existed prior to the trespass. How should compensation be computed for this injury? The law is not settled on this point; a great diversity of decision exists. We exclude now the consideration of any special acts detrimental to the land not necessarily involved in taking the timber or ore, and also all elements of bad faith or wilfulness.

In this particular action this conflict is confined to narrower limits than in trover and trespass *de bonis;* the conflict, when

Am. Dec. 189. But see Kramer v. Goodlander, 98 Pa. 353.

[1] Disbrow v. Westchester Hardwood Co., 164 N. Y. 415, 58 N. E. Rep. 519.

[2] Gaskins v. Davis, 115 N. C. 85, 20 S. E. Rep. 188, 25 L. R. A. 813.

[3] Gordon v. Grand Rapids & I. R. Co., 103 Mich. 379, 61 N. W. Rep. 549.

the wrong is not wilful, is between charging the defendant with the value of the trees standing, or stumpage, and ore in place, on one hand, and, on the other, its value immediately after severance from the land. The tendency of decision is toward the former rule; but as the trespasser cannot divest the owner of his title to the property when it becomes a chattel it is recognized as belonging to the owner of the land so that he may retake it, replevy it, or recover for it in actions for taking or conversion of personal property. It has been deemed the right of the owner to recover the value at the time it becomes a chattel; otherwise it is said the trespasser receives remuneration for services not requested by the owner, and for which he is not bound to make compensation. It is supposed that the right to retake the property and recover its value are correlative rights. Ruggles, J., said: "It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages."[1] The right of the owner to [376] retake his property is maintainable on the principle that he cannot be divested of it without his consent by the tortious act of a wrong-doer; but his rate of damages or the measure of his compensation is governed by another principle, which is that he is entitled to compensation commensurate, and only commensurate, with the injury suffered. When he sues to recover damages for the taking or conversion he sues for a wrong which precedes and does not include the defendant's acts which enhance the value. The cases which support the rule of damages confined to the value of the property before the trespass was committed are given in a note, with some [380] of the reasons advanced in their support.[2] As has been

[1] Silsbury v. McCoon, 3 N. Y. 384.

[2] Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151, was trespass *quare clausum fregit* for cutting down and carrying away trees. It was held that the measure of damages is the amount of injury which the plaintiff suffered from the whole trespass, taken as a continuous act; the increased value of the trees occasioned by the labor of the defendant in converting them into timber is not to be included. Hibbard, J., says: "The defendant having wrongfully cut and trimmed the plaintiff's trees, and it being impossible to separate the original property in them from the value subsequently added, it is unnecessary to cite authorities to show that the plaintiff, after they

observed, this measure of damages is only applied where the trespass is the result of inadvertence or mistake. The quality of the good faith which warrants its application is satisfied if

were cut and trimmed, remained the owner of the timber made from them, free from any lien or claim of the defendant for his labor, and that he might, therefore, have lawfully taken it peaceably into his possession. It is only where the identity of the original material has been destroyed, or where its value is insignificant compared with the value of the article manufactured from it or to which it has been annexed, that the law is otherwise. Weatherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653. The plaintiff might also have maintained replevin for the timber. Davis v. Easley, 13 Ill. 192; Wingate v. Smith, 20 Me. 287. Or he might, according to numerous authorities, have recovered its full value at the time it was carried away by bringing trover. Brown v. Sax, 7 Cow. 95; Baker v. Wheeler, 8 Wend. 505; Rice v. Hollenbeck, 19 Barb. 664; Grant v. Smith, 26 Mich. 201; Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189. According to the doctrine of Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569, he might have elected any day prior to the date of his writ as the time of the conversion; perhaps the same result might as well have been reached in trespass *de bonis asportatis*, but the difficulty of allowing the original taking to be abandoned, and a later one adopted, has probably been thought greater in that form of action than in trover, although judges have sometimes taken a different view. . . . If the owner of timber cut upon his land by a trespasser gets possession of it increased in value, he has the benefit of the increased value; the law neither divests him of his property, nor requires him to pay for improvements made without his authority; perhaps in trover, and possibly in trespass *de bonis asportatis*, he may be entitled to the same benefit; but we see no occasion for giving it to him where he brings his suit for the whole trespass of breaking [377] and entering his close and cutting down and carrying away his trees as a continuous act. The plaintiff is entitled to be compensated according to the magnitude of his loss, and the defendant ought only to be liable to compensate him according to the magnitude of his loss. The inquiry should be, how much was the plaintiff injured by the breaking and entering of his close and the cutting down and carrying away of his trees. The true measure of damages is the amount of injury which the plaintiff has actually suffered from the whole trespass. If the trees were worth no more to the plaintiff to stand than to the defendant to be cut into timber at that time, their value as timber, with the reasonable expense of cutting deducted, was the measure of the injury which was done to the plaintiff by cutting them. . . . His trees may have been prematurely cut; they may have been ornamental trees or fruit trees; their value after they were separated from the soil may have been but a small part of the real injury from cutting and removing them. 'The trees considered as timber may, from their youth, be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil.' Gilchrist, J., in Wallace v. Goodall, 18 N. H. 456. A rule of

the wrong was done without culpable negligence or wilful disregard of the rights of others, in the honest and reasonable belief that the act was rightful. Notice of the existence of

damages, which is manifestly unsound when applied to the cutting of trees which are more valuable while standing than after they are cut, cannot be usefully employed in other cases."

In Longfellow v. Quimby, 33 Me. 457, a like action, Shepley, C. J., said: "The plaintiff will be entitled to recover compensation for the injuries occasioned by the acts of the defendants upon his lands, to be ascertained by an estimate of the value of the trees cut and carried away, and of the injury, if any, occasioned by cutting them prematurely, and of the injury, if any, done to the land; and on the amount thus ascertained for being deprived of the use of his property may be added an amount equal to six per cent. per annum from the time of taking the property to the time of judgment." Stanton v. Prichard, 4 Hun, 266.

Whitbeck v. New York, etc. R. Co., 36 Barb. 644, was a similar action for damages done by burning the plaintiff's clover field and destroying his apple trees. The court held that the plaintiff should recover the value of the trees standing, and approved the refusal of the trial court to charge the jury that he could recover no more than the diminished value of the orchard lot by reason of the destruction of the trees. Johnson, J., said: "It is true that the trees in question were real estate, and in one sense part and parcel of the land itself. But so are buildings and fences, and grass, and trees of all kinds while growing upon the land. The true rule I conceive to be this: that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained without reference to the value of the soil on which it stands or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction. And it can make no difference, in this respect, whether the action is brought to recover for the destruction of a single tree, or all the trees in the orchard. There is no [378] intrinsic difficulty, as I conceive, in estimating the value of a fruit tree growing upon land, although it has strictly no market or commercial value, as a tree, independent of the land which sustains it. In this respect, however, it does not differ materially from buildings and other fixtures. But it does differ from trees which are usually converted into timber or firewood, and which are frequently sold as they stand, for that purpose, or nursery trees which are grown for market. The difference is this: in the one case the value consists chiefly in the thing itself, as a convertible and marketable commodity, while in the other the value consists chiefly in the quality and quantity of its average annual products; and it is capable of being leased as much as a field or a dwelling. The calculation by which the value would be determined in the two cases would be somewhat different, but, for aught I can see, it could be determined by the opinion of competent witnesses in the one case as well as in the other."

Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, was an action of tort for mining and carrying away coal, iron and other ores from the plaintiff's land. The court held

an adverse claim is an important element to be considered; but such notice alone will not necessarily place the wrong-doer in the position of a culpably wilful trespasser and subject him

that the plaintiff was entitled to recover on the ground that the taking of the ore and the injury done to the property were tortious; that the value of the ore was to be estimated as it lay in the bed, not as it was after the defendants had increased its value by removing it, and that to this was to be added the damage done to the real estate.

In re United Merthyr Collieries Company, L. R. 15 Eq. 46, was a case like the preceding. Sir James Bacon, V. C., said: "I have not the slightest intention of interfering with or departing from the decisions which have been mentioned to me (Powell v. Aiken, 4 K. & J. 343; Wood v. Morewood, 3 Q. B. 440, note; Morgan v. Powell, 3 Q. B. 278; Jegon v. Vivian, L. R. 6 Ch. 742; Phillips v. Homfray, id. 770; Llynvi Co. v. Brogden, L. R. 11 Eq. 188; Martin v. Porter, 5 M. & W. 351), especially the more recent cases, because, as I recollect, there was a want of exact agreement between some of the common-law cases and some of those which had formerly been decided in this court. I take the difference now to be entirely removed, and the rule to be clearly and plainly established, and so understanding, I made the order in this case. The words which are supposed to have been used are 'actual cost and expenses,'—the word that has been read from the short-hand notes is 'disbursements.' In my opinion there is not the slightest doubt about the meaning of either of these expressions. It is said that the trespasser must be treated as if he had been the purchaser. Now, that must be taken with a certain qualification. It is a useful illustration of what the court meant to decide in the particular case where that expression is to be found; but the principle of the decision is, that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements. If he had brought it to the pit's mouth when severed, he could only have done so by means of disbursements. If he himself had severed and brought the coal to the pit's mouth, whatever the value of it might then be would have to be deducted, because he would have borne the expenses on both these heads, which would have been actual disbursements, not profit; nor do 'just allowances' mean profit; but if I were to change the words of the order, I might leave it doubtful, or might open up some ground for argument, as to what was meant by just allowances. . . . The trespasser is not to charge as if somebody else had employed him to sever. If he had paid a certain sum to his workmen, and by the custom of the trade was entitled to charge a certain other sum, he is not to have the larger sum. The plaintiff is to be put in the same situation as he would have been in, neither better nor worse, if he himself had severed the coal and brought it to the pit's mouth. That must have been done, and could only have been done, by means of disbursements, not by any profit, not by any allowance in the trade, not by any artificial mode of guessing at it; but the books he must have kept would show how much money he spent in severing the coal,

to the more onerous measure of liability.[1] Where timber was cut on government land under permission of the secretary of the interior, who had no power to grant the license, and under

and how much money he spent in bringing it to the pit's mouth."

In Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617, the parties were owners of adjoining tracts of coal land, and the defendant had opened a mine upon his own land and worked it for years. The dividing line was not exactly known, and the plaintiff claimed the defendant had dug coal over the line and out of her land, which was denied. Lowrie, C. J., in delivering the opinion of the court, said: "The plaintiff insists that because the action is allowed for the coal as personal property, that is, after it has been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done. Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office. Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in its strict form, it is an action for the value of personal property lost by one and found by another and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion and of wrongful taking and conversion, and it affords compensation, not only for the value of the goods, but also for outrage and malice in the taking and detention of them. . . . Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. 6 Hill, 425, 41 Am. Dec. 753; 21 Barb. 92; 23 Conn. 523; 38 Me. 174, 61 Am. Dec. 239. Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall

[1] Whitney v. Huntington, 37 Minn. 197, 33 N. W. Rep. 561; King v. Merriman, 38 Minn. 47, 35 N. W. Rep. 570; Jegon v. Vivian, L. R. 6 Ch. 742.

the advice of counsel, such advice not being so plainly erroneous that a layman was charged with knowledge of the error, the trespasser was not chargeable with bad faith or with a wilful intent to commit a wrongful act.[1]

The severer rule of damages is applied in several states.[2] It

have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been to the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for *mesne* profits." Herdic v. Young, 55 Pa. 176, 93 Am. Dec. 739; Coleman's Appeal, 62 Pa. 252, 278; Yahoola, etc. Hydraulic & M. Co. v. Irby, 40 Ga. 479; Coxe v. England, 65 Pa. 212; Schlater v. Gay, 28 La. Ann. 340; Ensley v. Nashville, 2 Baxter, 144. See reasoning in opinion in Single v. Schneider, 24 Wis. 300-303, 30 id. 570; Webster v. Moe, 35 id. 75; Hungerford v. Redford, 29 id. 345; Railway Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep. 629; Winchester v. Craig, 33 Mich. 205.

The following recent cases are in harmony with the views expressed in those quoted from: Striegel v. Moore, 55 Iowa, 88, 7 N. W. Rep. 413; Hitchcock v. Libby, 70 N. H. 399, 47 Atl. Rep. 269; United States v. Homestake Mining Co., 117 Fed. Rep. 481, 54 C. C. A. 303; Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. Rep. 391; Chamberlain v. Collinson, 45 Iowa, 429; Clement v. Duffy, 54 id. 632, 7 N. W. Rep. 85; Gardere v. Blanton, 35 La. Ann. 811; Thompson v. Moiles, 46 Mich. 42, 8 N. W. Rep. 577; Hinman v. Heyderstadt, 32 Minn. 250, 20 N. W. Rep. 155, modifying Nesbitt v. St. Paul Lumber Co., 21 Minn. 491; King v. Merriman, 38 id. 47, 35 N. W. Rep. 570; Whitney v. Huntington, 37 Minn. 197, 33 N. W. Rep. 561; Oak Ridge Coal Co. v. Rogers, 108 Pa. 147; State v. Pacific Guano Co., 22 S. C. 50; Coal Creek Mining & M. Co. v. Moses, 15 Lea, 300; Ross v. Scott, id. 479; Lewis v. Courtright, 77 Iowa, 199, 41 N. W. Rep. 615; Viliski v. Minneapolis, 40 Minn. 304, 41 N. W. Rep. 1050, 3 L. R. A. 831; Austin v. Huntsville Coal & M. Co., 72 Mo. 534, 545, 37 Am. Rep. 446; Clowser v. Joplin Mining Co., 4 Dill. 469, note; Ayres v. Hubbard, 57 Mich. 322, 23 N. W. Rep. 829, 58 Am. Rep. 361; Bond v. Griffin, 74 Miss. 599, 22 So. Rep. 187; Johnson v. Kathan, 88 Hun, 456, 34 N. Y. Supp. 864; Clark v. Holdridge, 12 App. Div. 613, 43 N. Y. Supp. 115; Gaskins v. Davis, 115 N. C. 85, 91, 25 L. R. A. 813, 20 S. E. Rep. 188; Lehan v. Dillon, 19 Vict. L. R. 730; Warrior Coal & Coke Co. v. Mabel Mining Co., 112 Ala. 624, 20 So. Rep. 918; Hosli v. Yokel, 57 Mo. App. 622. See Dougherty v. Chesnutt, 86 Tenn. 1, 5 S. W. Rep. 444.

[1] United States v. Homestake Mining Co., 117 Fed. Rep. 481, 488, 54 C. C. A. 303, citing Selden v. Cashman, 20 Cal. 57, 81 Am. Dec. 93; Abbott v. 76 Land & Water Co., 101 Cal. 567, 37 Pac. Rep. 527.

[2] Maye v. Tappan, 23 Cal. 306. The trespass was committed by entering upon and taking away gold-bearing earth from the mining claim of the plaintiff. The court held the true measure of damages to be the value of the earth at the time it is separated from the surrounding soil and becomes a chattel. Crocker, J., delivering the opinion, after a review of the cases, said: "It will be noticed

is known, in the case of mining ores, as the royalty rule, being measured in point of time as is the royalty usually charged by land-owners for the privilege of mining thereon. The circumstances under which these various rules apply and "the doc-

that the rule of damages in such cases depends, to some extent, upon the form of the action, whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. The complaint in this case alleges that the defendants, at divers times, wrongfully entered upon a portion of plaintiff's mining claim, and extracted the gold and gold-bearing earth from a portion thereof; which gold and gold-bearing earth they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been $2,000. No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the *gravamen* of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages in a case like the present is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule, and one established by the decisions upon this question. In estimating these damages the expense of extracting the gold and separating it from the earth, after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs." Goller v. Fett, 30 Cal. 481; Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239; Firmin v. Firmin, 9 Hun, 571; Robertson v. Jones, 71 Ill. 405; McLean Coal Co. v. Long, 81 Ill. 359; Illinois, etc. R. & C. Co. v. Ogle, 82 Ill. 627, 25 Am. Rep. 342; Martin v. Porter, 5 M. & W. 351; Wood v. Morewood, 3 Q. B. 440, n.; Morgan v. Powell, 3 Q. B. 278; Wild v. Holt, 9 M. & W. 672; Barton Coal Co. v. Cox, 39 Md. 1, 17 Am. Rep. 525; Bennett v. Thompson, 13 Ired. 146; Parker v. Waycross & F. R. Co., 81 Ga. 387, 8 S. E. Rep. 871; Benson Mining & S. Co. v. Alta Mining & S. Co., 15 Pac. Rep. 565 (Arizona), 145 U. S. 428, 12 Sup. Ct. Rep. 877; Empire Gold Mining Co. v. Bonanza Gold Mining Co., 67 Cal. 406, 7 Pac. Rep. 810; Franklin Coal Co. v. McMillan, 49 Md. 549; Blaen Avon Coal Co. v. McCulloch, 59 id. 403; Atlantic, etc. Coal Co. v. Maryland Coal Co., 62 id. 135; Cheeney v. Nebraska & C. Stone Co., 41 Fed. Rep. 740 (Colo.); Omaha & Grant S. & R. Co. v. Tabor, 13 Colo. 41, 21 Pac. Rep. 925, 16 Am. St. 185, 5 L. R. A. 236 (in trover); Aurora Hill Mining Co. v. Eighty-five Mining Co., 12 Sawyer, 355, 34 Fed. Rep. 515; Union Bank v. Rideau Lumber Co., 3 Ont. L. R. 269; United States v. Homestake Mining Co., 117 Fed. Rep. 481, 54 C. C. A. 303; Sunnyside Coal & Coke Co. v. Reitz, 14 Ind. App. 478, 485, 39 N. E. Rep. 541, 43 id. 46; United States Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 Pac. Rep. 1045; St. Clair v. Cash Gold Mining & M. Co., 9 Colo. App. 235, 46 Pac. Rep. 466; McLean County Coal Co. v. Lennon, 91 Ill. 561; Thomas Pressed Brick Co. v. Herter, 60 Ill. App. 58; Donovan v. Consolidated Coal Co., 88 id. 589, 187 Ill. 32, 58 N. E. Rep. 290; Negley v. Cowell, 91 Iowa, 256, 59 N. W. Rep. 48, 51 Am. St. 345, stated in § 1011; Brown v. Pope, 27 Tex. Civ. App. 225, 65 S. W. Rep. 42. See Bull v. Griswold, 19 Ill. 631.

Where the milder rule of dam-

trine of the English courts on this subject," said Mr. Justice Miller,[1] "is probably as well stated by Lord Hatherley in the house of lords in the case of Livingston v. Rawyards Coal Co.[2] as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say will assert its authority, to punish the fraud by fixing the person with the value of the whole property which he has so furtively taken, and making him no allowance in respect to what he has so done, as would have been justly made to him if the parties had been working by agreement.' But 'when once we arrive at the fact that an inadvertence has been the cause of misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.' There seems to be no doubt," said Judge Miller, "that in the case of a wilful trespass the rule stated above is the law of damages both in England and in this country, though in some of the state courts the milder rule has been applied in this class of cases.[3] On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition."[4]

ages governs the plaintiff may recover the value of the ore mined in his vein, less only the actual cost of digging it, tramming it to the bottom of the shaft, and hoisting it to the surface. Whatever expense the defendant may have been to in running levels, drifts and cross-cuts to reach such vein were no part of the cost of extracting the ore therefrom. St. Clair v. Cash Gold Mining & M. Co., 9 Colo. App. 235, 46 Pac. Rep. 466.

[1] Wooden-ware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. Rep. 398; Benson Mining & S. Co. v. Alta Mining & S. Co., 145 U. S. 428, 12 Sup. Ct. Rep. 877.

[2] 5 App. Cas. 25.

[3] Weymouth v. Chicago & N. R. Co., 17 Wis. 550, 84 Am. Dec. 763; Single v. Schneider, 24 Wis. 299.

[4] Wooden-ware Co. v. United States, *supra;* Winchester v. Craig, 33 Mich. 205; Heard v. James, 49 Miss. 236; Baker v. Wheeler, 8 Wend. 505; Baldwin v. Porter, 12 Conn. 484.

A statute providing for the recovery of the highest market value of the manufactured product of timber wrongfully cut from the land of another applies where the trespasser had the right to go upon the land and cut certain timber, he having cut other timber which he had agreed not to cut.[1] In Illinois the severer rule of damages is applied notwithstanding the trespassing was done by mistake or through inadvertence. "No necessity exists for one miner to trespass upon an adjoining owner. If proper maps and plans of the mine are kept and measurements and surveys of the work made, as required by common prudence and the statute, each miner will have no difficulty in confining his operations to his own estate. When, therefore, one miner, in disregard of his duty, invades the property of another, he should not be permitted to profit by his unlawful act, which would be the case if the trespasser was only required to pay the value of the coal as it existed in the mine before it was taken."[2]

[381] § **1021. Liability for additional injury to land.** Accompanying trespasses of this nature there is frequently injury done to the land beyond taking away timber or minerals. Where such is the case additional damages are recoverable; and these will be assessed upon the particular facts.[3] In an action for breaking and entering the plaintiff's coal lands it was made to appear that the defendant mined coal and made excavations for that purpose, and thereby injured the coal left remaining as pillars; that, by bad mining or otherwise, he rendered it difficult or impossible for the plaintiff to get out or remove such pillars of remaining coal and thus depreciated its value. The court held the plaintiff entitled, in addition to damages for the coal actually removed, to recover for such as could not be removed what it was worth per ton in its native bed, and such damages for so much coal as could be removed with increased expense as the evidence might show such coal

[1] Everett v. Gores, 89 Wis. 421, 62 N. W. Rep. 82.

[2] Illinois, etc. R. & Coal Co. v. Ogle, 82 Ill. 627, 25 Am. Rep. 342, 92 Ill. 353; Donovan v. Consolidated Coal Co., 187 Ill. 28, 58 N. E. Rep. 290, 88 Ill. App. 589.

[3] Johnson v. Park, 13 Ky. L. Rep. 437, 17 S. W. Rep. 273; Maysville, etc. R. Co. v. Warnock, 10 Ky. L. Rep. 937 (Ky. Super. Ct.); Illinois Central R. Co. v. Le Blanc, 74 Miss. 626, 21 So. Rep. 760; Harrison v. Adamson, 86 Iowa, 693, 53 N. W. Rep. 334; Galveston, etc. R. Co. v. Chittim, 71 S. W. Rep. 294 (Tex. Ct. of Civ. App.).

to be diminished in value; that if the defendant in mining and excavating under the lands thereby rendered it more difficult or expensive for the plaintiff to obtain access to the coal unmined and depreciated its value, the plaintiff was entitled to recover such damages as he sustained from such depreciation and the increased difficulty and expense of mining and removing the coal.[1]

Where uncultivated and unfenced land was entered upon, fenced, planted and the crop removed therefrom the land-owner was held entitled to recover the value of the crop and for depreciation in the value of the land. Additional damages were not recoverable because it was the intention of the owner to allow the land to remain untilled, and because by its cultivation, if it so remained, it would suffer injury from washing and becoming weedy. The owner was bound to use the land as good husbandry required it to be used. The question on this point solely was, how much less was the land worth on account of its having been cultivated.[2] It admits of some question whether this is not making an extreme application of the doctrine of avoidable consequences. There can be no doubt that the washing of the soil and the growth of weeds would be the natural and proximate consequences of the cultivation — both results would follow from the act of the trespasser in the ordinary course of nature. The owner of the land had the right to hold it for an advance in the market price and sell it in its virgin state. He ought not to be compelled to mitigate the effects of the wrong done him by becoming a farmer or selling the land to some one who would have given more for it in its uncultivated condition than it was worth to him as it was left, or by selling in advance of the time he might otherwise have done.

§ 1022. Damage to unsecured ice, and for the diversion of water. In Illinois the damages for cutting timber or mining ores are measured by their value as soon as they become chattels. The same rule has been applied where ice was cut on a stream bounded by the land of him who sued for its cutting. His right to the ice is exclusive, and the measure of damages

[1] Barton Coal Co. v. Cox, 39 Md. 1, 11 Am. Rep. 518; Wallace v. Goodall, 18 N. H. 439.

[2] Keirnan v. Heaton, 69 Iowa, 136, 28 N. W. Rep. 478. See § 1011.

suggested applies regardless of the situation or convenience of the parties.[1] In a Michigan case ice was destroyed when it was six inches thick by the gross negligence of a steamer in navigating in unnecessary proximity to it. The damages were measured by the value of so much of the ice as would probably have been secured and saved for the market, less the expense connected with doing so. The defendants contended that the rule was "the true value of the ice, or rather the privilege of taking it — what it would have been shown to be had the matter been settled or the case tried on the very day that the ice was broken;" or, in other words, that the damages could not be affected by the fact that the price of ice was high during the following season. This was disagreed to by the court, and the price during such time was held to have been properly considered.[2] The New York supreme court has entertained the view, in a case in which it was found that the ice cut had no market value before the cutting, that the damages for cutting and removing it, if it created any right of action against the defendant, must depend upon whether it can be regarded an injury to the real estate of the owner, and consequently the amount of recovery must be such as to compensate for that injury only.[3] In Massachusetts one who drains the waters of a pond and destroys the ice thereon is liable for the value of the right to harvest the ice upon it and make it property at the time it was destroyed. In determining the value of that right the expense of securing the ice and the risks attending thereupon are factors.[4] In Pennsylvania the measure of recovery is not enhanced by the value bestowed upon the ice by the labor of a trespasser, in the absence of any circumstances of aggravation. If there is no proof of a market value at the

[1] Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196; Piper v. Connelly, 108 Ill. 647.

[2] People's Ice Co. v. Steamer Excelsior, 44 Mich. 229, 6 N. W. Rep. 636.

[3] Van Rensselaer v. Mould, 48 Hun, 396, 1 N. Y. Supp. 28.

In a later case before a referee the damages were assessed on the basis of the value of the plaintiff's right to sell the privilege of cutting and removing the ice which the defendant had cut and removed. The case came before the court in such form that it was not required to pass upon the question of damages. Van Rensselaer v. Mould, 77 Hun, 553, 28 N. Y. Supp. 901.

[4] Handforth v. Maynard, 154 Mass. 414, 28 N. E. Rep. 348. See Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 257, 258, 60 N. W. Rep. 717, 28 L. R. A. 581.

time and place where the injury was done, the value in the nearest market, respect being had as well to time as place, less the expense of getting the ice to market, including the loss from shrinkage while stored and in handling, measures the recovery.[1]

The owner of hydraulic power created by a dam may use all the water secured thereby, subject only to the needs of navigation, and one who wrongfully appropriates a part of such power must answer for the diminished power, and not merely for the diversion of water. The right to recover is not dependent upon the owner's facilities for using the power. The measure of recovery is the annual rental value of the actual amount of horse power taken at the dam, with interest computed from the close of each year during the period not affected by the statute of limitations.[2] In Utah one who causes the loss of water available for irrigating purposes is liable for its market value.[3]

§ 1023. Destruction of and injury to growing crops. There is not entire accord as to the measure of recovery for destroying or injuring growing crops. According to the preponderance of authority, the liability of the wrong-doer is fixed by the value of the crop in the condition it was when the trespass was committed.[4] If such value cannot be shown

[1] Stauffer v. Miller Soap Co., 151 Pa. 330, 25 Atl. Rep. 95.

As to what constitutes a sufficient appropriation of ice on a great pond or on a river to enable the appropriator to maintain trover therefor, see Barrett v. Rockport Ice Co., 84 Me. 155, 16 L. R. A. 874, 24 Atl. Rep. 802; People's Ice Co. v. Davenport, 149 Mass. 122, 21 N. E. Rep. 385; Brown v. Cunningham, 82 Iowa, 512, 12 L. R. A. 583, 48 N. W. Rep. 1042.

[2] Green Bay & M. Canal Co. v. Kaukauna Water Power Co., 112 Wis. 323, 87 N. W. Rep. 864.

[3] North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 23 Utah, 199, 63 Pac. Rep. 812.

[4] Richardson v. Northrop, 66 Barb. 85; Seamans v. Smith, 46 Barb. 320; Lommeland v. St. Paul, etc. R. Co., 35 Minn. 412 (overruled, see *infra*); Houston, etc. R. Co. v. Adams, 63 Tex. 200; Gresham v. Taylor, 51 Ala. 505; Colorado Consolidated Land & Water Co. v. Hartman, 5 Colo. App. 150, 38 Pac. Rep. 62; Irwin v. Nolde, 176 Pa. 594, 35 Atl. Rep. 217; Lampley v. Atlantic Coast Line R. Co., 63 S. C. 462, 41 S. E. Rep. 517. See Folsom v. Apple River Log-Driving Co., 41 Wis. 608–9.

Marston, C. J., pronounced this a very unsatisfactory rule, and said that it affords a way in which parties may be avenged of their adversaries with practical impunity. He said in a case in which it was sought to apply a corresponding rule to the destruction of ice on a navigable river, that "the owner of the growing crops would not be limited in his recovery to the value thereof at the time of their destruction, nor to the fair

the diminution in the rental value of the land by reason of the wrong has been held to be the measure of liability.[1] In a case in which a tenant sued his landlord for plowing under growing wheat the court said that the plaintiff as owner of two-thirds of the wheat was entitled to recover as damages the value of his share at the time it was destroyed; not its value for immediate use in the condition it then was, but with the view to his right to use the land until it was matured, and then harvest it. This value might be shown by evidence of the probable amount of wheat, the crop as it appeared when destroyed, would yield; the value of the same at the market season, and by deducting therefrom the necessary cost for harvesting and threshing.[2]

[382] The plaintiff should recover compensation according to the particular facts; he is entitled to be remunerated in respect to property taken or destroyed and for any other injury. The fact that all the labor necessary to produce a crop has been performed and the state of its growth at the time of the defendant's interference will necessarily enter into the calculation.[3] In ascertaining the value of a crop in accordance with this rule a considerable latitude of inquiry is properly open. The capacity of the land to produce crops being in question, evidence of the average yield of like crops upon similar lands in the neighborhood, under like circumstances

rental value of the lands. If the action were brought at once, and a trial had, the prospective yield and value of the crop when matured might be shown. The proof might be unsatisfactory and uncertain, and largely a matter of opinion. Such considerations should not, however, absolve the wrong-doer, and the dangers, if any, from such a rule he should incur. If such an action were not commenced or tried until after the time when such crops would have matured, the same elements of uncertainty would not exist. It would then be known whether the season had been a favorable or an unfavorable one; the yield per acre in that vicinity; the market price of the crop; the expense — all could be ascertained with tolerable certainty, and why should the law exclude such proofs?" People's Ice Co. v. Steamer Excelsior, 44 Mich. 229, 237, 6 N. W. Rep. 636.

[1] Larson v. Lammers, 81 Minn. 239, 83 N. W. Rep. 981; Burnett v. Great Northern R. Co., 76 Minn. 461, 79 N. W. Rep. 523.

[2] Scanland v. Musgrove, 91 Ill. App. 184.

[3] Williams v. Currie, 1 Man., Gr. & Scott, 841; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136; Jenkins v. McCoy, 50 Mo. 348; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384. See Chicago v. Huenerbein, 85 Ill. 594, 28 Am. Rep. 626.

and conditions, is admissible, and also the average market value of the crop injured, within reasonable limitations as to time, and the expense of harvesting and marketing a like crop.[1] The Minnesota case which laid down this doctrine, after being recognized as authority,[2] came under review with the result that it was overruled. In the overruling case the action was to recover for growing grass. The plaintiff (in the fall of the year and within two months after the fire) was permitted to show what his prospects ought to be for a crop of grass seed and hay the next summer, what the yield should be, and what, in all probability, the value of the seed and hay would be some ten months in the future, without taking into consideration the fact that the alleged destruction was in the fall, and that a crop of some character and value could be raised on the land in question in the same growing period, and thus mitigate the injury and loss. The court said: So much of the Lommeland case as justified the court below, on the trial of this case, in holding that evidence of events which occurred subsequent to the loss, such as the average product or yield of like crops under similar conditions and within reasonable limitations as to time, and of the future average market value of a matured crop, less the expense of harvesting and marketing, may be received when estimating damages, will have to be overruled. An action to recover damages for a partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property. In principle such an action cannot be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, although stated differently. The proof in an action to recover for trees destroyed is all directed to an ascertainment of the difference in the market value of the real property immediately before the injury and immediately after its infliction, this difference being the measure of

[1] Lommeland v. St. Paul, etc. R. Co., 35 Minn. 412, 29 N. W. Rep. 119; International, etc. R. Co. v. Pape, 73 Tex. 501, 11 S. W. Rep. 526; Gulf, etc. R. Co. v. McGowan, 73 Tex. 355, 11 S. W. Rep. 336; Galveston, etc. R. Co. v. Borsky, 2 Tex. Civ. App. 545, 21 S. W. Rep. 1011. See § 1045.

[2] Byrne v. Minneapolis, etc. R. Co., 38 Minn. 212, 36 N. W. Rep. 339, 8 Am. St. 668.

damages. The proof to recover for injuries to a growing crop is, or should be, confined to estimating the value of the crop destroyed; such value being the measure of damages. In ascertaining the amount of the recovery evidence that another crop of some character and value may be grown on the land the same growing period, of the average yield of like crops, of the market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased the value of the farm, may be considered. But evidence of matters occurring subsequently to the injury is not competent.[1] In addition to indorsing the mode of proof which generally prevails it has been suggested that the question may be solved by fixing the value of a year's rental of the land, with the cost of planting, fertilizing and bringing forward the crop until the time of its loss, and what the crop would bring at that time at a sale.[2]

Where posts and grass were destroyed their value and the injury caused to the land by the destruction of the turf measured the damages. "Evidence of the value of the grass as hay, as well as for pasturage purposes, was admissible, and from a showing of all the purposes for which the plaintiff's grass was useful and valuable, the jury should determine what its value was at the time at which and state in which it stood when burned. If the grass possessed a market value, that should be the criterion. But if, as is probable, there was no market value, considering it as useful for pasturage, its value when thus used should be taken."[3] If grass is wrongfully cut and carried away the damages are measured by its value in the meadow, no allowance being made for the labor of cutting it.[4]

In Iowa the value of the crop when matured, less the cost of tillage, etc., from the time of the injury, may be recovered;

[1] Ward v. Chicago, etc. R. Co., 61 Minn. 449, 63 N. W. Rep. 1104. See Burnett v. Great Northern R. Co., 76 Minn. 461, 79 N. W. Rep. 523; Larson v. Lammers, 81 Minn. 239, 38 N. W. Rep. 981.

[2] Colorado C. L. & W. Co. v. Hartman, *supra;* Lampley v. Atlantic Coast Line R. Co., 63 S. C. 462, 41 S. E. Rep. 517.

[3] Gulf, etc. R. Co. v. Matthews, 3 Tex. Civ. App. 493, 23 S. W. Rep. 90.

[4] Hosli v. Yokel, 57 Mo. App. 622.

the plaintiff may also recover reasonable compensation for the labor necessarily expended in trying to save his crop from destruction.[1] This is the rule in Kansas.[2] In Illinois if a trespasser cuts wheat the owner is entitled to recover as if he had himself performed the whole labor of harvesting.[3] In an action against trespassers the trouble of looking after them is not to be taken into consideration as an item of damage.[4] If a meadow is destroyed the cost of restoring it measures the damages.[5] A better statement of the rule is that the damages are measurable by the cost of re-seeding the meadow and its rental value during the time it will not produce a crop.[6] "While this might result in giving plaintiff a better meadow than he lost, defendant cannot complain. It must make good the loss it has occasioned. If it cannot do this without doing something more, the plaintiff should not suffer."[7] The reason for making a distinction as to the method of assessing damages for the loss of trees and the loss of grass is thus stated: The value of the use during the time lost is an important element. This can be accurately ascertained in the case of a meadow, but cannot as to trees or a hedge. How long it will take to get grass in a certain field can be foretold with sub-

[1] Smith v. Chicago, etc. R. Co., 38 Iowa, 518. Compare Drake v. Chicago, etc. R. Co., 63 id. 302, 310, 19 N. W. Rep. 215, 50 Am. Rep. 746.

In an action in case to recover for the destruction of a fence and injuries to growing trees, all caused by the direct acts of the defendant, there cannot be a recovery for the inconvenience and labor of preserving crops from damage by animals. Such elements of damage, besides being too remote, were not provable under the declaration. Krueger v. Le Blanc, 62 Mich. 70, 28 N. W. Rep. 757.

[2] Missouri Pacific R. Co. v. Ricketts, 45 Kan. 617, 26 Pac. Rep. 50.

[3] Bull v. Griswold, 19 Ill. 631; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

[4] Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525.

[5] Vermilya v. Chicago, etc. R. Co., 66 Iowa, 606, 24 N. W. Rep. 234, 55 Am. Rep. 279; Hamilton v. Des Moines, etc. R. Co., 84 Iowa, 131, 50 N. W. Rep. 567.

The damages for injuries to growing grass through the incursions of animals can be established by evidence tending to show how many cattle could be grazed upon the land trespassed upon, and what such pasturage would be worth. Buttles v. Chicago, etc. R. Co., 43 Mo. App. 280.

[6] Pittsburgh, etc. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. Rep. 285; Railway Co. v. Jones, 59 Ark. 105, 26 S. W. Rep. 595; Bradley v. Iowa Central R. Co., 111 Iowa, 562, 82 N. W. Rep. 996; Krejci v. Chicago, etc. R. Co., —— Iowa, ——, 90 N. W. Rep. 708.

[7] Bradley v. R. Co., *supra*. See § 1018.

stantial certainty; how long it will take trees or a hedge to attain a certain size is largely a subject of guess. In any case, it takes so long as to leave too much room for doubtful elements to enter into the calculation. The value of the grass destroyed is also an element of damages.[1] The right to recover on the basis of these elements of value is not affected by the fact that it might be more profitable for the plaintiff to have plowed up the meadow land and planted it to other crops. He may use his land for any purpose that pleases him.[2] Where cattle were herded upon uninclosed land the owner of the land was entitled to recover the difference in the market value of the grass crop by reason thereof during the time the herding continued and what it would have been had the herding not been done,[3] and also the difference in the market value of the land by reason of the herding. The *onus* of showing that other cattle than the defendant's grazed on the land and the extent of damage done by them was upon him.[4] In the absence of evidence showing the value of grass as such if the injury is shown to be permanent, the recovery will be measured by the depreciation in the value of the land.[5] If grass and fruit trees are merely injured the cost of restoring them is not the measure of liability, but the difference in their value before and after the injury.[6]

§ 1024. Destruction of fences. If fences are destroyed or injured the recovery should fully compensate for their restoration in as good condition as before the wrong was done.[7] It

[1] Id.

[2] Id.; Toledo, etc. R. Co. v. Kingman, 49 Ill. App. 43.

Evidence to show that the meadow in question had been burned and the turf and roots damaged by fire previous to the time the defendant caused it to burn is admissible. Gulf, etc. R. Co. v. Saddler, 8 Tex. Civ. App. 300, 27 S. W. Rep. 904.

[3] Gulf, etc. R. Co. v. Jones, 1 Tex. Civ. App. 372, 21 S. W. Rep. 145.

[4] Harrison v. Adamson, 86 Iowa, 693, 53 N. W. Rep. 334.

[5] Gulf, etc. R. Co. v. Cusenberry, 5 Tex. Civ. App. 114, 28 S. W. Rep. 851, citing Fort Worth, etc. R. Co. v. Hogsett, 67 Tex. 685, 4 S. W. Rep. 365; Galveston, etc. R. Co. v. Horne, 69 Tex. 643, 9 S. W. Rep. 440.

[6] Hamilton v. Des Moines, etc. R. Co., 84 Iowa, 131, 50 N. W. Rep. 567.

[7] Central R. & B. Co. v. Murray, 93 Ga. 256, 20 S. E. Rep. 129; Helms v. Munro, 16 Vict. L. R. 591.

In McBride v. Cameron, 12 N. Z. L. R. 316, it was ruled that where a tenant's fence, though it was old, was pulled down under a frivolous assertion of right, he could recover damages equal to the cost of a new fence, less ten per cent.

is immaterial to the wrong-doer that the plaintiff's lessee was bound to make repairs — the obligation to do so does not require the lessee to replace improvements destroyed solely through the fault of a stranger.[1] The actual market value of a fence is not the measure of the trespasser's liability for its destruction, but its value as an inclosure of the plaintiff's land. In arriving at that value the cost of making the fence may be regarded, including material and labor. And if a rail fence destroyed has been replaced by a wire fence the cost of the latter may be considered, and from a comparison of the respective cost of the fences, and from any evidence which may be offered tending to show that rail fences are being superseded by wire fences, determine the value of that destroyed.[2] On the destruction of a hedge fence the measure of recovery is the difference between the value of the land inclosed by it with and without the fence.[3] In an action for destroying a fence inclosing a ranch used for dairy purposes, thereby letting in other people's cattle which destroyed the grass, it was erroneous, as tending to the allowance of remote and speculative damages, to admit evidence of profits that the plaintiff might have made from animals he did not have and had made no arrangements to procure.[4] The value of crops destroyed by cattle may be recovered as a consequential damage from tortiously letting down or removing the fence around the same,[5] at least where successive trespasses are committed.[6] Doubtless if a fence is broken and the owner is aware of it in time to make it whole before the crops which it inclosed are damaged, he must do so if he can accomplish it at a reasonable expense and with moderate effort.[7] Damage done to crops after the plaintiff has had a reasonable time to repair a fence broken down by trespassing animals cannot be recovered for.[8] But this duty does not rest

[1] Gulf, etc. R. Co. v. Smith, 3 Tex. Civ. App. 483, 23 S. W. Rep. 89.

[2] Gulf, etc. R. Co. v. Wallace, 14 Tex. Civ. App. 386, 37 S. W. Rep. 382.

[3] Bradley v. Iowa Central R. Co., 111 Iowa, 562, 82 N. W. Rep. 996.

[4] Giaccomini v. Bulkeley, 51 Cal. 260.

[5] Daniel v. Obert, 20 Ill. App. 557; Hardin v. Kennedy, 2 McCord, 277; Garrett v. Sewell, 108 Ala. 521, 18 So. Rep. 737. See § 28 for a statement and illustrations of the rule of liability for consequential damages; also Crawford v. Maxwell, 3 Humph. 476; Richardson v. Milburn, 11 Md. 340.

[6] Bridgers v. Dill, 97 N. C. 222, 1 S. E. Rep. 767.

[7] § 155; Willis v. Branch, 94 N. C. 142.

[8] Watkins v. Rist, 67 Vt. 284, 31 Atl. Rep. 413.

upon the land-owner when a railroad company has neglected its statutory obligation to put in cattle-guards.[1]

§ **1025. Injuries to party-walls.** If a party-wall is used and holes cut in it for inserting the girders, beams, etc., of a new building which is erected the damages include not only the injury done by the cutting, but also such sum as will compensate the owner for the permanent use of the wall.[2] If an addition is made to such a wall whereby it is weakened the expense of removing the portion added and the damage caused the original wall may be recovered; but damages resulting from the loss of a sale of property of which the wall forms part are too remote.[3] If such a wall is recklessly undermined the trespasser must respond for injury to the plaintiff's goods resulting from the use of water for extinguishing a fire caused by the falling of the wall. No deduction is to be made from the value of the goods because they were insured.[4] In such a case a tenant who is obliged to vacate the building may recover the value of the premises for rent during the remainder of the term; and, if he has carried on an established business there, may recover for the injury done it. In Georgia he cannot recover for the loss of profits and the value of the good-will of his business as such, but evidence as to these may be received to throw light on the value of his leasehold estate, if the extent of the damage done by their loss can be ascertained with reasonable certainty.[5]

§ **1026. Interest on the damages.** According to the view of some courts it is discretionary with the jury to allow interest on the damages awarded;[6] others hold that it is error to direct that it be allowed.[7] But it has been allowed as matter of law against trespassers on government lands whether the trespass was wilful or inadvertent,[8] and it has been so allowed

[1] Houston, etc. R. Co. v. Adams, 63 Tex. 200.

[2] Ritter v. Sieger, 105 Pa. 400.

[3] Brooker v. McLean, 5 Ont. 209.

[4] Hammond v. Schiff, 109 N. C. 161, 6 S. E. Rep. 753.

[5] Bass v. West, 110 Ga. 698, 36 S. E. Rep. 244.

[6] Lawrence, etc. R. Co. v. Cobb, 35 Ohio St. 94; Walrath v. Redfield, 18 N. Y. 457; Pittsburgh, etc. R. Co. v. Swinney, 97 Ind. 586; Gress Lumber Co. v. Coody, 104 Ga. 611, 30 S. E. Rep. 810.

[7] Chicago v. Allcock, 86 Ill. 384; Greeley, etc. R. Co. v. Yount, 7 Colo. App. 189, 42 Pac. Rep. 1023.

[8] United States v. Williams, 18 Fed. Rep. 475.

in other cases. The Michigan court has observed that the old rule was that interest could not be allowed upon unliquidated damages. The tendency of courts has been to set this rule aside, and adopt the more reasonable one, in cases of injury to property, that the jury must first determine the actual damage sustained, and allow interest upon that sum from its date.[1] If the highest market value of the product of timber wrongfully cut is recovered, pursuant to a statute, interest on such value should not be allowed.[2]

§ 1027. Mitigation of damages. Beyond question, the injured party is bound to use reasonable means to mitigate the injury which has been done him,[3] and to prevent further damage.[4] The measure of such duty will be governed by circumstances, including the relation of the plaintiff to the premises trespassed upon and the amount of the outlay required to prevent additional loss.[5] In a case in which the defendant diverted a stream of water which crossed the plaintiff's land, it was held competent for the former to show that by an expenditure of $350 the latter could have removed the dam, thus returning the water into the old channel immediately after the trespass, and have filled the excavation made upon his premises, thus restoring them to their former condition. The court said: It would have been for the jury to determine whether or not such undertaking and expense would have been reasonable and within the means of the plaintiff. Of course, he would not have been called upon to embarrass himself financially or to do anything unreasonable or unlawful in the premises. The evidence should have been admitted, and the plaintiff would then have had the opportunity to show that such undertaking on his part was not reasonably within

[1] Taylor v. Bay City Street R. Co., 101 Mich. 140, 59 N. W. Rep. 447; Gates v. Comstock, 113 Mich. 127, 71 N. W. Rep. 515; Gulf, etc. R. Co. v. Jones, 1 Tex. Civ. App. 372, 21 S. W. Rep. 145. See § 355 for a discussion of the principle and authorities.

[2] Everett v. Gores, 92 Wis. 527, 66 N. W. Rep. 616.

[3] Scherrer v. Baltzer, 84 Ill. App. 126.

[4] Falley v. Courter, 93 Mich. 473, 53 N. W. Rep. 621; Sweeny v. Montana Central R. Co., 19 Mont. 163, 47 Pac. Rep. 791; Higgins v. New York, etc. R. Co., 78 Hun, 567, 29 N. Y. Supp. 563; Gulf, etc. R. Co. v. Simonton, 2 Tex. Civ. App. 558, 22 S. W. Rep. 285; St. Louis, etc. R. Co. v. Ayres, 67 Ark. 371, 55 S. W. Rep. 159.

[5] Galveston, etc. R. Co. v. Borsky, 2 Tex. Civ. App. 545, 21 S. W. Rep. 1011.

his power or means to accomplish, and if the jury believed that such was the case, then they would have been warranted in finding that it was his duty to have taken these steps to restore his premises to their former condition and to prevent the increase of damages. One is not, as a rule, expected to enter or go upon a third party's premises to save his own property from increased injury, resulting from the wrongful act of another. If the dam in question was on a vacant, uninclosed and unoccupied mining location, upon and over which, by custom, people are permitted to camp, go, travel, and do other things not hurtful to the premises, it would not be unreasonable to expect an injured party to go upon such open land to prevent serious damage in a great emergency.[1]

If the plaintiff, in the exercise of reasonable prudence, has incurred expense in an attempt to lessen the damage which might result from the defendant's wrongful act, the latter is liable therefor if the value of the property of the plaintiff was not thereby increased; in the latter event the liability would not exceed the value of the use of the property purchased for such purpose.[2] If ornamental trees in the limits of a street are removed during the process of unlawfully grading the street, the incidental benefits resulting to the plaintiff's remaining premises by reason of the improvement do not lessen his recovery.[3] One whose possession of business premises has been so interfered with that he cannot continue in them must secure another place in which to carry on his avocation.[4] But benefit which may result to the injured person from the subsequent act of the wrong-doer does not always mitigate the latter's responsibility. Thus, an officer who unlawfully breaks into a dwelling and removes property therefrom cannot lessen his liability by proving that, pursuant to the levy, he sold the property and paid the proceeds to the execution creditor. The levy, being void, all that was done in pursuance of it was invalid.[5] It is otherwise if there is a subsequent valid levy in-

[1] Sweeny v. Montana Central R. Co., 25 Mont. 543, 557, 62 Pac. Rep. 912.

[2] Willis v. Perry, 92 Iowa, 297, 60 N. W. Rep. 727, 26 L. R. A. 124.

[3] Fisher v. Naysmith, 106 Mich. 71, 64 N. W. Rep. 19; Gerrish v. New Market Manuf. Co., 30 N. H. 478; Hurley v. Jones, 165 Pa. 34, 30 Atl. Rep. 499.

[4] Willis v. Branch, 94 N. C. 142.

[5] Welsh v. Wilson, 34 Minn. 92, 24 N. W. Rep. 327.

dependently of the trespass.[1] The mitigation of exemplary damages is elsewhere considered.[2] In an action against an officer for an alleged unlawful search of premises if special damages are asked for the humiliation and disgrace suffered by the plaintiff and his family, it may be shown that two women occupants of the house searched, one of whom was plaintiff's servant, the other, apparently, being a roomer, were prostitutes.[3]

§ 1028. Aggravations and special damages. Where the act complained of was done with force so as to constitute a proper ground for an action of trespass *vi et armis*, all the damage of the plaintiff, of which such injurious act is the efficient cause and for which he is entitled to recover in any form, may be recovered in that action, whether such damage ensues immediately or does not occur until some time after the act is done. If special or peculiar damages are claimed, such as are not the usual consequence of the act, it is necessary to set them forth specifically in the declaration by way of aggravation, that the defendant may have due notice of the claim.[4] Thus, where the defendant broke and entered the plaintiff's close, lying adjacent to a river, and dug into a bank near a dam across the river and removed some gravel, in consequence of which a flood in the river which took place three weeks afterwards carried away a portion of the close and the cider mill, etc., belonging to the plaintiff, he recovered damages for the whole of such injury in an action of trespass *quare clausum fregit*.[5] A defendant who had pulled down the plaintiff's fence so that his cattle escaped and were lost was liable for their value in an action for pulling down the fence.[6] The defendant's sheep, while trespassing upon the plaintiff's land, mingled with his sheep and communicated to them a disease of which many of them died. In an action of trespass *quare clausum fregit* evidence of this fact was properly received to affect the

[1] Howard v. Manderfield, 31 Minn. 337, 17 N. W. Rep. 946.

[2] § 1032.

[3] Collins v. Clark, 72 S. W. Rep. 97 (Tex. Ct. of Civ. App.).

[4] Patchen v. Keeley, 19 Nev. 404, 14 Pac. Rep. 347; Gusdorf v. Duncan, 94 Md. 160, 50 Atl. Rep. 574; Dickinson v. Boyle, 17 Pick. 78, 28 Am. Dec. 281; McTavish v. Carroll, 13 Md. 429; Sherman v. Dutch, 16 Ill. 283; Freelove v. Gould, 3 Kan. App. 750, 45 Pac. Rep. 454.

[5] Dickinson v. Boyle, *supra*.

[6] Damron v. Roach, 4 Humph. 134

damages; the plaintiff was entitled to recover for the loss of [384] his sheep as well as for the breach of his close; in order to recover such damages it was not necessary for him to prove that the defendant had knowledge of the diseased state of his sheep at the time the disease was imparted; but it was competent for the plaintiff to prove such knowledge to enhance his damages without any allegation to that effect in the declaration.[1] Where the defendant destroyed part of a mill the plaintiff was allowed to recover for the interruption of its use and a consequent loss of profits.[2] Lost profits have been recovered in a considerable number of cases ruled under varying facts.[3] A landlord who has lost tenants and been unable to secure others may recover the resulting loss of rents.[4] Where one was deprived of the profitable use of pasture for his stock by the tortious conduct of the defendant in turning in his cattle with the plaintiff's, and, in consequence of the overcrowding of the pasture, the plaintiff's cattle suffered, the damages to which he was entitled were held not to be merely the value of the pasturage in the vicinity, but the value of the growth and increase in weight which his cattle might reasonably have been expected to attain but for the overfeeding caused by the trespass; and to show this the testimony of farmers, graziers and drovers having experience with cattle and that mode of feeding was competent; it was also held to be competent to show what would have been the market value of the cattle in the vicinity but for the act, and what was the reduced value

[1] Barnum v. Vandusen, 16 Conn. 201; Anderson v. Buckton, 1 Str. 192.

[2] White v. Moseley, 8 Pick. 356; National Fibre Board Co. v. Lewiston & A. Electric Light Co., 95 Me. 318, 49 Atl. Rep. 1095; French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. Rep. 113; Holden v. Lake Co., 53 N. H. 552; Simmons v. Brown, 5 R. I. 299; Hammatt v. Russ, 16 Me. 171; McTavish v. Carroll, 13 Md. 429; Whipple v. Wanskuck Co., 12 R. I. 321.

[3] Id.; Willis v. Perry, 92 Iowa, 297, 60 N. W. Rep. 727, 26 L. R. A. 124; Hueston v. Mississippi & Rum River Boom Co., 76 Minn. 251, 79 N. W. Rep. 92; Capel v. Lyons, 3 N. Y. Misc. 73, 22 N. Y. Supp. 278; Denison v. Ford, 10 Daly, 414; Schile v. Brokhahus, 80 N. Y. 620; Oklahoma v. Hill, 6 Okl. 115, 52 Pac. Rep. 242; Choctaw, etc. R. Co. v. Alexander, 7 Okl. 579, 52 Pac. Rep. 944; Gildersleeve v. Overstolz, 90 Mo. App. 518. One who has been deprived of the use of land he intended to plant and cultivate, but who had made no preparation to do so, cannot recover for the profits he might have made if it had been planted. Irwin v. Nolde, 164 Pa. 205, 30 Atl. Rep. 246.

[4] Goldschmid v. Mayor, 14 App. Div. 135, 43 N. Y. Supp. 447.

in the same market in consequence of it; the difference in price per head and per pound in cattle of different weights and conditions. The value in a distant market could only be shown so far as it tended to control the home market, the measure of damages being what the cattle would have been worth but for the injury to the pasture by the trespass, and the reduced amount caused by the injury to be estimated up to and at the time of the bringing of the action — unless the cattle have been sold prior to that day — then at the date of the sale. It was also ruled that damage to cattle resulting from loss of feed, occasioned by the tortious occupation of the plaintiff's pasture by the defendant's cattle, is not included in the damage to the pasture caused by such occupation; and the condition of the pasture, its value as such for future use at the time of the commencement of the action, were proper subjects of inquiry in estimating damages which had then [385] been sustained.[1] Where lands were depastured it was proper to show the expense of subsequently feeding hay to the plaintiff's sheep at his range as bearing on the value of the pasture destroyed; damage directly resulting from the trespass, though it ensued after suit begun, was also properly shown.[2] In actions of tort, damages which are the natural and proximate consequences of the defendant's wrongful act may be recovered though not contemplated by the wrong-doer. The injured party enters into no relation with the defendant, and assumes no voluntary risk in the matter of the wrong. Nor is any want of certainty in respect to his loss, resulting from the manner in which it is produced by the defendant, attributable to the plaintiff; therefore, in the determination of damage for compensation, so far as it is measurable upon any legal standard, the same rules will apply as in their assessment for breach of contract; but such damages will not be assumed to be a full reparation unless they appear to include compensation for the entire injury. The injured party is entitled to complete indemnity even though the amount is not ascertainable with certainty and precision. All the facts will be submitted to the jury with proper instructions that they may award such

[1] Gilbert v. Kennedy, 21 Mich. 117.

[2] Cosgriff v. Miller, — Wyo. —, 68 Pac. Rep. 206.

damages as in their discretion and judgment are due for the injury as thus shown.[1] The owner of a pasture rendered dangerous for the use of stock by partial flooding is not bound to cease using it, but may recover the damages resulting from its use if he exercises ordinary prudence to prevent their increase, including the value of animals lost, and the expense of reasonable efforts to prevent damage, including the cost of guarding the stock, conveying them to a place of safety, returning them after the danger had ceased, and also the increased cost of keeping them while they were elsewhere.[2]

§ **1029. Same subject.** If an employer is deprived of workmen because of the loss of a building used by them for shelter he may recover the amount reasonably expended in providing other shelter, for the protraction of the labor in which they [386] were engaged and the value of his own time in consequence of such protraction.[3] Where a trespass is wilful and malicious, or of such character or committed under such cir- [387] cumstances as render it likely to produce injury to persons or property, the trespasser is liable to any person injured. It is not necessary that he should intend to do the particular injury which ensues.[4] Maliciously and wantonly pulling out and throwing away pins used in coupling together the cars of a train, whereby they were uncoupled, and the plaintiff, an employee of the company, whose duty it was to hitch and couple cars as required, sustained an injury to one of his hands while in the ordinary discharge of his duties in consequence of such uncoupling, entitled him to recover for such injury.[5] Where the remains of a child were removed from a cemetery lot to which the parent held a deed, the latter maintained an action of tort in the nature of trespass *quare clausum fregit*, in which the natural injury to his feelings was properly considered.[6] For the wrongful expulsion of a widow, before the

[1] Id.; Hughes v. Austin, 12 Tex. Civ. App. 178, 184, 33 S. W. Rep. 607, citing the text; Gilbert v. Kennedy, *supra*.

[2] Hughes v. Austin, 12 Tex. Civ. App. 178, 33 S. W. Rep. 607, approving Gilbert v. Kennedy, *supra*.

[3] Carlisle v. Callahan, 78 Ga. 320, 2 S. E. Rep. 751.

[4] Munger v. Baker, 65 Barb. 539; Vandenburgh v. Truax, 4 Denio, 464, 47 Am. Dec. 268; Scott v. Shepherd, 2 W. Black. 892.

[5] Munger v. Baker, *supra;* Wyant v. Crouse, 127 Mich. 158, 86 N. W. Rep. 527.

[6] Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Bessemer Land &

assignment of her dower, from the family dwelling, she may recover, in addition to her actual damages, for injury to her health and for such pain and suffering as naturally resulted.[1] One who stealthily enters a dwelling in the night time and commits a trespass on the property of the owner therein is liable to the latter's wife for the consequences resulting from her fright, there being an affection of the nervous system. "It is within the common observation of all that fright may and usually does affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who voluntarily causes a diseased condition of the latter must anticipate the consequence which follows it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain it seems to us that the injury resulting therefrom is the direct result of the act producing the fright."[2]

If, in consequence of a trespass, the plaintiff's business upon the premises is impaired or destroyed, damages therefor may be recovered. Where he was engaged in the business of repairing watches, making gold pens and selling jewelry on premises which were rendered untenantable by a trespass, it was held that past profits in that business, though they could not be taken as the exact measure of future profits, were proper to be proved and taken into consideration by the jury, and allowed such weight as they, in the exercise of good sense and sound judgment, should think them entitled to. If in consequence of a trespass rendering the premises untenantable the plaintiff was obliged to remove to another place of business, he is entitled to show that his business fell off in consequence and how much. The court in deciding a case involving the foregoing facts announced this general rule: "When, from the nature of the case, the amount of damages cannot be estimated

Imp. Co. v. Jenkins, 111 Ala. 135, 18 So. Rep. 565, 56 Am. St. 26; Thirkfield v. Mountain View Cemetery Ass'n, 12 Utah, 76, 81, 41 Pac. Rep. 564; Jacobus v. Congregation of Children of Israel, 107 Ga. 518, 33 S. E. Rep. 853, 73 Am. St. 141.

[1] Stevens v. Stevens, 96 Ga. 374, 23 S. E. Rep. 312.

[2] Watson v. Dilts, 116 Iowa, 249, 89 N. W. Rep. 1068, 57 L. R. A. 559. See § 21 *et seq.*

with certainty, or only a part of them can be so estimated, there is no objection to placing before the jury all the facts and circumstances of the case having any tendency to show [388] damages or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, or as may tend to prevent the allowance of such as may be merely possible, or too remote and fanciful in their character to be safely considered as the result of the injury."[1] In addition to recovering the value of his lease, a tenant who is obliged to leave the demised premises may recover for the time necessarily occupied in removing therefrom, the expense incurred in doing so and for other loss directly resulting. But he cannot recover for the loss of *estimated* profits, nor for the mental suffering resulting from the removal.[2] Such changes were made in the construction of leased premises used for business purposes as necessitated their abandonment by the tenant. The trespasser was liable for the loss of a water privilege acquired by the tenant for business purposes, for the value of the leasehold interest and any advantages constituting a part of or directly growing out of such interest, the expense of removing to another place of business, any damage resulting from the loss of the use of improvements abandoned with the leased premises, and also for loss of profits.[3] Properly speaking, special damages are those which are stated under a *per quod* as the consequence of the breaking and entry; and where the defendant is guilty of some outrage connected with a particular trespass, and it is a part of the trespass by being done at the same time, it is matter of aggravation or a substantive ground of action and damage.

§ **1030. Same subject.** The taking and carrying away of personal property at the time of breaking and entering the close, or a personal injury, may be alleged as matter of aggrava-

[1] Allison v. Chandler, 11 Mich. 542; St. John v. Mayor, 13 How. Pr. 527; Sherman v. Dutch, 16 Ill. 283; Clark v. St. Clair, etc. Ice Co., 24 Mich. 508; Freidenheit v. Edmundson, 36 Mo. 226; Kemper v. Louisville, 14 Bush, 87; Walter v. Post, 6 Duer, 363, 373.

[2] Pennsylvania R. Co. v. Eby, 107 Pa. 166.

[3] Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. Rep. 1114, 22 Am. St. 291.

tion, either in the count for breaking the close or in a distinct count as a substantive cause of action; the latter is the more orderly method of pleading.[1] If alleged either as aggravation or as a distinct ground of damages in the count for breaking the close it is a dependent claim, and will not, if proved, support the action if the case for breaking the close be not established.[2] But when established, the specific claim for taking and converting property or for the personal injury is a part of the *gravamen* of the action, and the plaintiff will be entitled to recover the value of the property taken and converted or for the personal injury, as well as for breaking and entering the close.[3] But for the purpose of such recovery the

[1] Bishop v. Baker, 19 Pick. 517; Wright v. Chandler, 4 Bibb, 422; Bahr v. Boley, 85 Hun, 448, 32 N. Y. Supp. 881; O'Horo v. Kelsey, 60 App. Div. 604, 70 N. Y. Supp. 14. See Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. Rep 56.

[2] Eames v. Prentice, 8 Cush. 337; Warner v. Abbey, 112 Mass. 355; Brown v. Lake, 29 Ohio St. 64; Oklahoma v. Hill, 6 Okl. 114, 52 Pac. Rep. 242.

[3] Curlewis v. Laurie, 12 Q. B. 640; Woolley v. Carter, 7 N. J. L. 85; Sampson v. Henry, 13 Pick. 36; Warner v. Abbey, 112 Mass. 355; Razzo v. Varni, 81 Cal. 289, 22 Pac. Rep. 848; Moore v. Baylis, 56 Hun, 647, 10 N. Y. Supp. 62.

In O'Horo v. Kelsey, 60 App. Div. 604, 70 N. Y. Supp. 14. it was alleged that the plaintiff was lawfully in possession of a hotel; that the defendant, for the purpose of ousting him, forcibly trespassed upon the premises; committed an assault upon the plaintiff; by false statements induced another to remove the hotel furniture; without process attempted to remove the plaintiff and his family from the hotel by force, and, failing in that, attempted to obtain a process of the court by which to accomplish the same purpose, knowing that he was not legally entitled thereto. The court said: If those allegations were established by proof we think the plaintiff would be entitled to recover in this action all the damages sustained in consequence of those several acts, viz., the damages sustained on account of the trespass committed by the defendant or by his agent, including the damage occasioned thereby to the business of the plaintiff; the damage sustained by the plaintiff on account of being assaulted by the defendant or by his agents, if authorized by him; the damages sustained on account of the removal of the furniture under the chattel mortgage in question, if wrongful and it was procured to be done by the defendant, and the fair value of such furniture, less what was due and owing upon said chattel mortgage, if it was wrongfully removed or caused to be taken and removed by the defendant; the expense incurred by the plaintiff in defending the proceedings instituted by the defendant to oust him of the possession of the premises, if such proceedings were illegal and not instituted in good faith. Also the value of the property not included in the chattel mortgage which was taken or destroyed by the defendant while en-

trespass to personal property or to person should be stated with the same particularity as when it is the sole ground of action; otherwise such wrongs will be mere matter of aggrava- [389] tion, not traversable, not a distinct ground of damage, but only a circumstance tending to give character to the principal charge and to enhance the damages assessable thereon.[1] Where a daughter, either of or under age, is seduced in her father's house he may allege it and the consequential loss of services as matter of aggravation in an action of trespass *quare clausum*.[2] The fact that the continuation of a trespass is an obstruction to the plaintiff's obtaining a lease of the mining property trespassed on is not a ground for recovery in an action for the trespass.[3]

§ 1031. Exemplary damages. Such damages may be given in this action, and these are in the discretion of the jury where the facts are such as legally to warrant them. If the trespass is wilfully or maliciously done, or if there is connected with the breaking and entry, otherwise not the subject of punitive damages, circumstances of outrage, insult, or wanton destruction of personal property, the proof of these facts may be submitted as grounds for damages by way of punishment; and the amount to be allowed is left to the sound discretion of the jury.[4] Such damages are given as punishment, and their al-

gaged in attempting to dispossess the plaintiff, and taken or removed for the purpose of compelling the plaintiff to vacate the premises. This measure of liability was not improper because the defendant acted in good faith, or as a reasonably prudent and cautious man would have acted under the circumstances. Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. Rep. 56, is in accord on the last point, but in opposition as to the right to recover for a personal injury.

[1] Thayer v. Sherlock, 4 Mich. 173; Chamberlain v. Greenfield, 3 Wils. 292; Rucker v. McNeely, 4 Blackf. 179; Keenan v. Cavanaugh, 44 Vt. 268; Allred v. Bray, 41 Mo. 484, 97 Am. Dec. 283; North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 23 Utah, 199, 206, 63 Pac. Rep. 812, citing the text; Ream v. Rank, 3 S. & R. 215; Bracegirdle v. Orford, 2 M. & S. 77; Bateman v. Goodyear, 12 Conn. 575; Johnson v. Hannahan, 3 Strobh. 425; Brown v. Lake, 29 Ohio St. 64; Plumb v. Ives, 39 Conn. 120.

[2] Mercer v. Walmsley, 5 Har. & J. 27, 9 Am. Dec. 486; Woodward v. Walton, 2 B. & P. N. R. 476.

[3] Vallancourt v. O'Rorke, 1 Vict. (Ct. of Mines) 43.

[4] West Chicago Street R. Co. v. Morrison, 160 Ill. 288, 43 N. E. Rep. 393; Thirkfield v. Mountain View Cemetery Ass'n, 12 Utah, 76, 41 Pac. Rep. 564.

lowance and amount are submitted only when there is evidence tending to show conduct culpable in point of intention. The act in question, or some act accompanying or connected with it, must be recklessly violent, oppressive, wanton or malicious.[1] The defendant is presumed to know the law and to

[1] Gilman v. Brown, 115 Wis. 1, 91 N. W. Rep. 227; Cosgriff v. Miller, — Wyo. —, 68 Pac. Rep. 206; Avera v. Williams, — Miss. —, 33 So. Rep. 501; Gusdorff v. Duncan, 94 Md. 160, 50 Atl. Rep. 574; Hicks v. Swift Creek Mill Co., 133 Ala. 411, 31 So. Rep. 947; Merest v. Harvey, 5 Taunt. 442; Sears v. Lyons, 2 Stark. 317; Tullidge v. Wade, 3 Wils. 18; Doe v. Filliter, 13 M. & W. 47; Moore v. Crose, 43 Ind. 30; Ames v. Hilton, 70 Me. 36; Cutler v. Smith, 57 Ill. 252; Smalley v. Smalley, 81 Ill. 70; Brown v. Allen, 35 Iowa, 306; Kolb v. Bankhead, 18 Tex. 228; Gordon v. Jones, 27 Tex. 620; Jasper v. Purnell, 67 Ill. 358; Huftalin v. Misner, 70 Ill. 55; Owings v. Ulroy, 3 A. K. Marsh. 454; Bateman v. Goodyear, 12 Conn. 580; Major v. Pulliam, 3 Dana, 582; Perkins v. Towle, 43 N. H. 220, 80 Am. Dec. 149; Bradshaw v. Buchannan, 50 Tex. 492; Stillwell v. Barnett, 60 Ill. 210; Hamilton v. Third Avenue R. Co., 53 N. Y. 25; Boardman v. Goldsmith, 48 Vt. 403; Parker v. Shackelford, 61 Mo. 68; Dearlove v. Herrington, 70 Ill. 251; Devaughn v. Heath, 37 Ala. 595; Ellsworth v. Potter, 41 Vt. 685; Rosser v. Bunn, 66 Ala. 89; Smith v. Thompson, 55 Md. 5, 39 Am. Rep. 409; Atlantic, etc. Coal Co. v. Maryland Coal Co., 62 Md. 135; Baltimore & O. R. Co. v. Boyd, 63 Md. 325; Craig v. Cook, 28 Minn. 232, 9 N. W. Rep. 712; Kemmitt v. Adamson, 44 Minn. 121, 46 N. W. Rep. 327; Weyer v. Wegner, 58 Tex. 539; Koenigs v. Jung, 73 Wis. 178, 40 N. W. Rep. 801; Reynolds v. Braithwaite, 131 Pa. 416, 18 Atl. Rep. 1110; Trauerman v. Lippincott, 39 Mo. App. 478; Diamond, etc. Sewerage Co. v. Smith, 27 Tex. Civ. App. 558, 66 S. W. Rep. 141; Wright v. Hollywood Cemetery Co., 112 Ga. 884, 38 S. E. Rep. 94; Stevens v. Stevens, 96 Ga. 374, 23 S. E. Rep. 312; Jacobus v. Congregation of Children of Israel, 107 Ga. 518, 33 S. E. Rep. 853, 73 Am. St. 141; Thompson v. Evans, 49 Ill. App. 289; Donovan v. Consolidated Coal Co., 88 Ill. App. 589; Maysville, etc. R. v. Warnock, 10 Ky. L. Rep. 937 (Ky. Super. Ct.); Patterson v. Waldman, 20 Ky. L. Rep. 514, 46 S. W. Rep. 17; Ohio Valley Tel. Co. v. Meyer, 22 Ky. L. Rep. 36, 56 S. W. Rep. 673 ("malicious" means the intentional doing of a wrongful act without legal right); Trainer v. Wolff, 58 N. J. L. 381, 33 Atl. Rep. 1051; Sheldon v. Baumann, 19 App. Div. 61, 45 N. Y. Supp. 1016; Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. Rep. 718; Remington v. Kirby, 120 N. C. 320, 26 S. E. Rep. 917; Studebaker v. New Castle Gas Co., 7 Pa. Super. Ct. 641; Kennedy v. Erdman, 150 Pa. 427, 24 Atl. Rep. 643; Huling v. Henderson, 161 Pa. 553, 29 Atl. Rep. 276; Telephone & Tel. Co. v. Shaw, 102 Tenn. 313, 52 S. W. Rep. 163; Connor v. Sewell, 90 Tex. 275, 38 S. W. Rep. 35; Nolan v. Mendere, 6 Tex. Civ. App. 203, 25 S. W. Rep. 28; Thirkfield v. Mountain View Cemetery Ass'n, 12 Utah, 76, 41 Pac. Rep. 564; Scheer v. Kriesel, 109 Wis. 125, 85 N. W. Rep. 138; Leary v. United Hercules Hydraulic Sluicing Co., 10 N. Z. L. R. 420; Cumberland Telephone & Tel. Co. v. Cassedy, 78 Miss. 666, 29 So. Rep. 762; Garrett v. Sewell, 108 Ala. 521, 18 So. Rep. 737.

The government is entitled to exemplary damages for trespass upon

have acted with general malice when he violates it.[1] In England mere wilfulness and persistence in continuing a trespass do not justify the infliction of a penalty beyond the loss sustained by the plaintiff.[2] The act of the president of a corporation, whose employees have committed a trespass, in ordering the removal of the structures erected by them, cannot be considered in mitigation of punitive damages.[3] A plaintiff in execution who, with full knowledge of the unlawful acts done by an officer, ratifies them, will be liable for reasonable exemplary damages.[4] But a later case, without noticing that which lays down the doctrine stated, declares that one who is not liable for a trespass by reason of participation in the actual force, or by any connection with it through direction or advice, but merely because of a subsequent ratification, is not liable for such damages.[5] It is said in a recent case that malice is not to be inferred from the fact that the defendant intended to commit a trespass upon unimproved and uninclosed land, in the absence of a purpose to put its owner in a worse condition than he would otherwise have been.[6] But a later case is less favorable to the defendant.[7] The pecuniary ability of the defendant may be shown when punitive damages are recoverable.[8]

its lands. United States v. Taylor, 35 Fed. Rep. 484.

In O'Connor v. Parrott, 22 Ill. App. 429, plaintiff's premises were broken and entered and property alleged to be worth $1,000 was carried away under a pretense of serving a distress for $50. A verdict for $6,500 did not show passion or prejudice.

In Trauerman v. Lippincott, 39 Mo. App. 478, a verdict for $50 actual and $1.450 exemplary damages was sustained.

In Ireland the jury may award punitive damages if the defendant enters premises in a mode which he knows is illegal. Reeves v. Penrose, 26 L. R. Ire. 141.

[1] Farwell v. Warren, 51 Ill. 467; Raynor v. Nims, 37 Mich. 34, 26 Am. Rep. 493.

[2] McArthur v. Cornwall, [1892] App. Cas. 75, 89. Compare Cosgriff v. Miller, *infra;* and see Hollister v. Ruddy, 66 N. J. L. 68, 48 Atl. Rep. 520.

[3] Kentucky Midland R. Co. v. Stump, 12 Ky. L. Rep. 316 (Ky. Super. Ct.).

[4] People's Building & Loan Ass'n v. McElroy, 79 Ill. App. 266.

[5] Goldstein v. Miller, 93 Ill. App. 103, citing Grund v. Van Vleck, 69 Ill. 478; Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. Rep. 93, 56 Am. Rep. 169; Pardridge v. Brady, 7 Ill. App. 639; Leiter v. Day, 35 id. 248; Douglas v. Hoffman, 72 id. 110.

[6] Kiernan v. Heaton, 69 Iowa, 136, 28 N. W. Rep. 478. See Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. Rep. 56.

[7] Cosgriff v. Miller, — Wyo. —, 68 Pac. Rep. 206.

[8] Telephone & Tel. Co. v. Shaw, 102

§ 1032. Same subject; mitigations. Though an entry [390] is made upon real estate under the conviction that the right to do so exists, if it is in fact wrongful and wilful injury is done to the plaintiff's property the defendant will subject himself to liability for exemplary damages.[1] So if, in making such entry where he is entitled to possession, he uses force to overcome opposition, commits an assault and battery upon the occupant, injures his personal property in removing it from the premises to obtain possession, he may, by reason of such force in the assertion of his rights and for such injury to person and property, subject himself to such damages.[2] The circumstance, however, that the defendant was entitled to possession of the real estate should be taken into consideration in determining the amount of such damages, for it is less culpable for a person to attempt to recover his own property by force than to attempt to rob another of property to which the actor has no claim.[3] Where an assault in such case was committed upon the occupant's wife, and personal property belonging to the husband was injured, and two suits were brought against the trespasser — one by the husband and wife for the personal injury to her, and the other by the husband alone for the assault on his wife, injury to his furniture, and for breaking his close, the former of which was first tried and exemplary damages given therein,— it was held that on the trial of the second action instructions in favor of exemplary damages, correct in themselves, would be misleading and erroneous if the jury were not reminded that the same transaction had been the subject of such damages on a preceding trial; though the jury had a right to give punitory damages in both suits, yet, on the question of amount, the former verdict should be considered.[4] The fact that a trespass in removing a fence was committed in pursuance of the vote of the town has been allowed to be proved in mitigation of exemplary damages.[5] Such damages may be

Tenn. 313, 52 S. W. Rep. 163; Cosgriff v. Miller, *supra;* Gilman v. Brown, 115 Wis. 1, 91 N. W. Rep. 227. See §§ 404, 405, 744.

[1] Snores v. Brooks, 81 Ga. 468, 8 S. E. Rep. 429, 12 Am. St. 332; Best v. Allen, 30 Ill. 30, 81 Am. Dec. 338.

[2] Reeder v. Purdy, 41 Ill. 279; Bonsall v. McKay, 1 Houst. 520; Hedgepeth v. Robertson, 18 Tex. 858; Champion v. Vincent, 20 id. 811; Greenville, etc. R. Co. v. Partlow, 14 Rich. 237.

[3] Reeder v. Purdy, 41 Ill. 279.

[4] Id.

[5] Gray v. Waterman, 40 Ill. 522;

mitigated by proof of the mischievous language or conduct of the defendant if it was connected with the plaintiff's act, although it does not legally justify the injury done.[1] It is no excuse for committing a trespass upon a house that it had a bad reputation.[2]

[391] The principle of permitting damages in certain cases to go beyond naked compensation is for example and the punishment of the guilty party for the wicked, corrupt and malignant motive and design which prompted him to the wrongful act. A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no abuse of power, nor excuses such act; yet in morals and the eye of the law there is a vast difference between the criminality of a person acting mistakenly from a worthy motive and one committing the same act in a wanton and malignant spirit, and with a corrupt and wicked design. Hence, where the jury are called upon to give smart money to punish the party guilty of the wrongful act any evidence which would show this difference, or, rather, all the facts and circumstances which tend to explain or disclose [392] the motives and design of such party, should go to the jury for consideration.[3] Where the tort survives and the action is brought against the representative of the deceased tortfeasor vindictive damages should never be allowed, no matter how aggravated the trespass.[4] The liability for such damages is restricted to the individual who does the acts which give the right to claim them. While the party who institutes proceedings and the attorney who directs the service of a void writ are liable for compensatory damages resulting from a proper observance of its mandate, they are not answerable for exemplary damages because the officer who served such writ acted in excess of its requirements.[5]

Jackel v. Reiman, 78 Tex. 588, 14 S. W. Rep. 1001.

[1] Wilson v. Young, 31 Wis. 574.

[2] Weston v. Gravlin, 49 Vt. 507; Love v. Moynehan, 16 Ill. 277; Perkins v. Towle, 43 N. H. 220, 80 Am. Dec. 149.

[3] Simpson v. McCaffrey, 13 Ohio, 508, approved in Western U. Tel. Co. v. Smith, 64 Ohio St. 106, 116, 59 N. E. Rep. 890; Marchand v. Haber, 16 N. Y. Misc. 319, 37 N. Y. Supp. 950; Camp v. Camp, 59 Vt. 667, 10 Atl. Rep. 748; Barrett v. Mobile, 129 Ala. 179, 185, 30 So. Rep. 36.

[4] Ripey v. Miller, 11 Ired. 247. See § 412.

[5] Marks v. Culmer, 6 Utah, 419, 24 Pac. Rep. 528; Cooley's Torts, 131. See § 412.

Section 2.

INJURY TO INHERITANCE.

§ 1033. Injury to the rights of parties not in possession. As has been stated, the same act may be injurious to several persons having different interests: to the person having a limited estate in possession, and the person or persons having the fee subject to that possessory title. The owner of the reversionary or expectant estate has no claim for damages where the wrong affects only its present enjoyment; and when it affects the value of the whole estate in possession and in expectancy, he has no claim for damages except for the injury to the inheritance.[1] This injury may arise from the wrongful acts of the owner of the intermediate estate or a stranger; when done by the former it is waste. Trespass will not lie against either, because the wrong is not to the possession of the injured party. In the appropriate action, however, compensation is meted out to him on the same principles, and in proportion to the injury sustained.[2] An exception to the rule that the owner of leased premises cannot recover for an injury to the possession is made where such injury affects the rental value of the premises under a lease which was in effect before the trespass was committed. In the case in which this exception was declared, the rental to be paid for the term was not fixed for the whole term but was made to depend for certain future periods of the term upon the agreement of the parties, or, they failing to agree, upon the decision of arbitrators. It was considered that the latter, in fixing the rental value for a term of years, would do so with reference to the conditions

[1] Elizabethtown, etc. R. Co. v. Price, 11 Ky. L. Rep. 367 (Ky. Super. Ct.); Jordan v. Benwood, 42 W. Va. 312, 321, 26 S. E. Rep. 266, 57 Am. St. 859, 36 L. R. A. 519, citing the text.

[2] Van Deusen v. Young, 29 N. Y. 9; Randall v. Cleveland, 6 Conn. 328; Shadwell v. Hutchinson, 2 B. & Ad. 97; Dutro v. Wilson, 4 Ohio St. 101; California Dry Dock Co. v. Armstrong, 17 Fed. Rep. 216; Elizabethtown, etc. R. Co. v. Price, *supra*.

If it is uncertain whether a devisee has absolute power to sell land when he sees fit and to receive the proceeds for his own use, or is so restricted that he can sell it only to meet his necessities, and it cannot be known whether any part of the land or its proceeds will ever come to the residuary devisee, the holder of the life estate may recover full damages. Rockwood v. Robinson, 159 Mass. 406, 34 N. E. Rep. 521.

existing when they acted; those conditions, being permanent, resulted in such damage to the lessor that he was entitled to recover for the damage to the rental value. Fee damages, in lieu of an injunction, were allowed as of the time the action was begun rather than as of the date of the expiration of the term.[1]

If a house demised to a tenant has been set on fire or thrown down from the negligence of a neighbor the damages are apportionable between the landlord and tenant. The latter is entitled to recover in respect to the value of his possessory interest and unexpired term, and the landlord in respect to the injury to his reversion.[2] But if the tenant is bound by covenant to keep the house in repair a substantial injury would accrue to him, and he would be entitled to recover the cost of rebuilding the house, deducting the difference in value between old materials and new.[3] The tenant must, however, first pay or satisfy the claim of the landlord. The amount he expends for this purpose measures his recovery against the wrong-doer.[4]

[393] The declaration in an action brought by a reversioner must either expressly allege the act to have been done to the injury of the reversion or must state an injury of such a permanent nature as to be necessarily prejudicial thereto, which allegation must be proved.[5] Waste is the abuse or destructive use of property by him who has not the absolute, unqualified title, and differs from trespass in this: that the latter is an injury by the unauthorized use of another's property by one who has no right whatever.[6] Blackstone says it is a spoil or destruction of houses, gardens, trees or other corporeal hereditaments, and the disherison of him that hath the remainder or reversion.[7] It is voluntary when the tenant does some act injurious to the inheritance, and permissive when he omits

[1] Kernochan v. Manhattan R. Co., 161 N. Y. 339, 55 N. E. Rep. 906, 17 App. Div. 634, 45 N. Y. Supp. 1143.

[2] Panton v. Isham, 3 Lev. 359, 1 Salk. 19; California Dry Dock Co. v. Armstrong, 17 Fed. Rep. 216.

[3] Lukin v. Goodsall, 2 Peake, 15; 1 Add. on Tort. 315.

[4] California Dry Dock Co. v. Armstrong, 17 Fed. Rep. 216; Wood v. Griffin, 46 N. H. 231.

[5] Baxter v. Taylor, 4 B. & Ad. 72; Jackson v. Pesked, 1 M. & S. 234; Tucker v. Newman, 11 Ad. & E. 40.

[6] Duvall v. Waters, 1 Bland's Ch. 569, 18 Am. Dec. 350.

[7] 2 Bl. Com., ch. 18. See Proffitt v. Henderson, 29 Mo. 325.

some duty and thereby an injury results to the inheritance; to tear a house down is voluntary waste; to suffer it to go to decay for want of necessary repairs is permissive.[1] To be waste it must either diminish the value of the estate, increase the burdens upon it, or impair the evidence of title of him who has the inheritance.[2] The damages for this injury and the remedy for them are generally regulated by statute. In some states only single damages are given, in others double and treble damages.[3]

§ **1034. Same subject.** The damage for waste being, by definition, for injury to the inheritance, the plaintiff can recover only for such injury as affects his expectant estate. Thus, where one or more of several heirs, entitled as tenants in common to a reversionary interest in lands, sue the recovery will be limited to the proportion of damages those suing are entitled to.[4] If waste is committed by cutting down timber, removing buildings, carrying away gravel or other substance of the estate the owner of the inheritance will have a right to the same damages as he would have against a stranger who impaired the value of his estate by similar tortious acts. In general, this damage is the amount the estate is diminished thereby in value.[5] In determining the amount of damage [394] for cutting and removing wood the jury are not limited to the value of that actually cut and removed; they may and should

[1] Id.; 3 Dane Abr. 214; 1 Wash. Real Prop. 126.

[2] Id.; Huntley v. Russell, 13 Q. B. 588; Young v. Spencer, 10 B. & C. 145.

[3] See 1 Wash. Real Prop. 142.

[4] Lowery v. Rowland, 104 Ala. 420, 16 So. Rep. 88.

[5] Harder v. Harder, 26 Barb. 409; Jesser v. Gifford, 4 Burr. 2141; Agate v. Lowenbein, 6 Daly, 291; Dickinson v. Baltimore, 48 Md. 583, 30 Am. Rep. 492; Ayer v. Bartlett, 9 Pick. 156; White v. Stoner, 18 Mo. App. 540; Stoudenmire v. De Bardelaben, 85 Ala. 85, 4 So. Rep. 723; Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. Rep. 621; Dorsey v. Moore, 100 N. C. 41, 6 S. E. Rep. 270; Whorton v. Webster, 56 Wis. 356, 369, 14 N. W. Rep. 280; Jordan v. Benwood, 42 W. Va. 312, 321, 26 S. E. Rep. 266, 57 Am. St. 859, citing the text; Lowery v. Rowland, 104 Ala. 420, 16 So. Rep. 88; Cole v. Bickelhaupt, 64 App. Div. 6, 71 N. Y. Supp. 636. See Worrall v. Munn, 53 N. Y. 185, 38 id. 137.

The breach of a covenant by a tenant not to commit waste does not subject him to the same measure of damages as the breach of a covenant to deliver up the property at the end of the term in the same state as it came to him. The damages are measured by the diminution in the value of the reversion, less a discount for immediate payment. Whitham v. Kershaw, 16 Q. B. Div. 613.

also consider the effect which the cutting has had upon the place wasted. The damages are equal to the solid and permanent injury to the inheritance.[1] If one in possession with the right of a tenant for life of agricultural land commits waste by cutting timber necessary to be retained for the use of the farm the reversioner may recover for this damage as well as the value of the timber.[2] An agreement entered into between the parties for the assessment of the damages upon the basis of the value of the trees cut will be enforced.[3]

There are two lines of authorities concerning the measure of damages a mortgagee may recover for an injury to the estate which diminishes his security. There is no denial of his right, whether he holds the first or second mortgage, to maintain an action for such wrong either against the mortgagor or a stranger.[4] The variance as to the measure of damages results from the difference in the nature of the mortgagee's estate. In Massachusetts the mortgage vests the legal estate in the mortgagee and carries with it the right of possession. Accordingly, it is there held that a second mortgagee may recover the full amount of damages done to the mortgaged premises, notwithstanding the security for his debt remains ample.[5] But where the mortgage is not considered as a common-law conveyance on condition, but as a security for the debt, the damages to the mortgagee are measured by the diminution of his security regardless of the extent of the injury done to the land.[6] If the wrong is done by a third party he is liable to the extent of the mortgagee's claim, not exceeding, in case of trespass by cutting timber, the value of that cut, including the rate of interest the mortgagor was to pay, at least where the latter is insolvent.[7]

[1] Harder v. Harder, 26 Barb. 409; Morris v. Knight, 14 Pa. Super. Ct. 324.

[2] Van Duesen v. Young, 29 N. Y. 9.

[3] Lowery v. Rowland, 104 Ala. 420, 16 So. Rep. 88.

[4] Jones on Mort. (4th ed.), §§ 695, 695*a*; Heath v. Haile, 45 S. C. 642, 24 S. E. Rep. 300; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 Pac. Rep. 184, 13 Am. St. 147; Arnold v. Broad, 15 Colo. App. 389, 62 Pac. Rep. 577, and cases cited.

[5] Gooding v. Shea, 103 Mass. 360, 4 Am. Rep. 563; Byrom v. Chapin, 113 Mass. 308; James v. Worcester, 141 Mass. 361, 5 N. E. Rep. 826.

[6] Schalk v. Kingsley, 42 N. J. L. 32; Van Pelt v. McGraw, 4 N. Y. 110; Atkinson v. Hewett, 63 Wis. 396, 23 N. W. Rep. 889; Morgan v. Gilbert, 2 Flip. 645, 2 Fed. Rep. 835; Heath v. Haile, 45 S. C. 642, 24 S. E. Rep. 300; Arnold v. Broad, *supra*.

[7] Atkinson v. Hewett, *supra*.

Section 3.

NUISANCE.

§ 1035. What is a nuisance. A private nuisance has been defined to be anything wrongfully done to the hurt or annoyance of the lands, tenements or hereditaments of another.[1] It may be anything which is calculated to interfere with the comfortable enjoyment of a man's house, as smoke, noise or bad odors, even when not injurious to health.[2] It may be any wrongful act which destroys or deteriorates the prop- [395] erty of another, or interferes with the lawful use and enjoyment thereof; or any act which unlawfully hinders the enjoyment of a common or public right and thereby causes a special injury.[3] An actionable nuisance may be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.[4] It may be created by an affirmative act causing annoyance and damage, or by neglect

[1] 3 Black. Com. 215; Cooper v. Hall, 5 Ohio, 320.

[2] Rex v. White, 1 Burr. 333; Tenant v. Goldwin, 1 Salk. 360; Rex v. Neil, 2 C. & P. 485; Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201; Fish v. Dodge, 4 Denio, 311, 47 Am. Dec. 254; First Baptist Church v. Schenectady, etc. R. Co., 5 Barb. 79; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Whitney v. Bartholomew, 21 Conn. 213; Attorney General v. Steward, 20 N. J. Eq. 417; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Duncan v. Hayes, 22 N. J. Eq. 27; Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170; Meigs v. Lister, 23 N. J. Eq. 199; Pottstown Gas Co. v. Murphy, 39 Pa. 257; Bliss v. Hall, 4 Bing. N. C. 183; Greene v. Nunnemacher, 36 Wis. 50; McKeon v. See, 4 Robert. 449; Cropsey v. Murphy, 1 Hilt. 126; Whalen v. Keith, 35 Mo. 87; Tate v. Parrish, 7 T. B. Mon. 325; Smiths v. McConathy, 11 Mo. 518; Sparhawk v. Union, etc. R. Co., 54 Pa. 401; State v. Haines, 30 Me. 65; Walter v. Selfe, 4 De G. & Sm. 315; Soltau v. De Held, 2 Sim. (N. S.) 133, 159; Elliotson v. Feetham, 2 Bing. N. C. 134; Scott v. Bay, 3 Md. 431; Rosenheimer v. Standard Gas Light Co., 36 App. Div. 1, 55 N. Y. Supp. 192; Booth v. Rome, etc. R. Co., 140 N. Y. 267, 277, 35 N. E. Rep. 592, 37 Am. St. 552, 24 L. R. A. 105; Herbert v. Rainey, 162 Pa. 525, 29 Atl. Rep. 725.

[3] Fay v. Prentice, 1 C. B. 828; Aiken v. Benedict, 39 Barb. 400; Norton v. Scholefield, 9 M. & W. 665; State v. Taylor, 29 Ind. 517; Brown v. Illius, 27 Conn. 84, 71 Am. Dec. 49; Woodward v. Aborn, 35 Me. 271, 58 Am. Dec. 699; Middlestadt v. Waupaca Starch & Potato Co., 93 Wis. 4, 66 N. W. Rep. 713; Whaley v. Wilson, 112 Ala. 627, 20 So. Rep. 922.

[4] Sullivan v. Waterman, 20 R. I. 372, 39 Atl. Rep. 243, 39 L. R. A. 773; Watson v. New Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. St. 345; Cooley on Torts, 565.

of some duty of prevention.[1] Where it is sought to make one accountable for the consequences of acts done by him upon his own land, the question, in general, is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his neighbor in his pre-existing rights of property he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the care and skill with which such operations may have been conducted.[2] The only exception to this rule is where the act which causes the nuisance is done under public authority. In such a case the persons who act within the powers granted are not liable for consequential damages if they so act with care and skill.[3] The statutory authority which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury.[4] This is the result of statutes which require that railroad companies shall receive and transport freight, provide suitable facilities for receiving the same, main-

[1] Hawkesworth v. Thompson, 98 Mass. 77, 93 Am. Dec. 137; Cawkwell v. Russell, 26 L. J. (Ex.) 35.

[2] Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. Rep. 246, 9 L. R. A. 711; Pottstown Gas Co. v. Murphy, 39 Pa. 257; Hauck v. Tidewater Pipe Line Co., 153 Pa. 366, 26 Atl. Rep. 644, 34 Am. St. 710, 20 L. R. A. 642; Frost v. Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. Rep. 280, 46 Am. St. 736, 26 L. R. A. 693; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. Rep. 900, 25 Am. St. 595, 9 L. R. A. 737; Same v. Spangler, 86 Md. 562, 39 Atl. Rep. 270, 63 Am. St. 533; Central of Georgia R. Co. v. Windham, 126 Ala. 552, 28 So. Rep. 392; Rosenheimer v. Standard Gas Light Co., 36 App. Div. 1, 55 N. Y. Supp. 192; Weston Paper Co. v. Pope, 155 Ind. 394, 57 N. E. Rep. 719.

[3] Transportation Co. v. Chicago, 99 U. S. 635; Attwood v. Bangor, 83 Me. 582, 22 Atl. Rep. 466; Uline v. New York, etc. R. Co., 101 N. Y. 98, 4 N. E. Rep. 536, 54 Am. Rep. 661; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 9 Atl. Rep. 871, 2 Am. St. 618; Same v. Marchant, 119 Pa. 541, 13 Atl. Rep. 690, 4 Am. St. 659. See Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. Rep. 719.

[4] Cogswell v. New York, etc. R. Co., 103 N. Y. 10, 8 N. E. Rep. 537, 57 Am. Rep. 701; Baltimore & P. R. Co. v. Fifth Baptist Church, *supra;* Pottstown Gas Co. v. Murphy, 39 Pa. 257; Commonwealth v. Kidder, 107 Mass. 188; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. Rep. 246, 9 L. R. A. 711.

tain a station at every village through which their roads pass, and carry all live-stock offered for shipment. Under these provisions the maintenance of stock yards is necessary, and no liability exists as for a nuisance if the location is a reasonably proper one and they are kept in reasonably good condition.[1]

The erector of a nuisance is liable not only for its creation, but also for its continuance.[2] When he who creates a nuisance conveys the land, he does not transfer the liability therefor to the grantee; the latter is not generally liable until, upon request, he refuses to remove the nuisance;[3] if a tenant or grantee, however, continues a nuisance after request to abate it, he is liable, if he has the power to abate it.[4] One in possession of premises under a lease for nine hundred and ninety-nine years is the owner thereof so far as responsibility for maintaining and keeping in repair a structure upon the prem-

[1] Dolan v. Chicago, etc. R. Co., — Wis. —, 95 N. W. Rep. 385. See Anderson v. Same, 85 Minn. 337, 88 N. W. Rep. 1001.

[2] Conhocton, etc. Co. v. Buffalo, etc. R. Co., 52 Barb. 390; Waggoner v. Jermaine, 3 Denio, 306, 45 Am. Dec. 481; Fish v. Dodge, 4 Denio, 311, 47 Am. Dec. 254; Smith v. Elliott, 9 Pa. 345; Pickard v. Collins, 3 Barb. 444.

[3] Wabash R. Co. v. Sanders, 47 Ill. App. 436; Penruddock's Case, 5 Coke, 100 *b*; Pierson v. Glenn, 14 N. J. L. 37, 25 Am. Dec. 497; Plumer v. Harper, 3 N. H. 88; Eastman v. Amoskeag Manuf. Co. 44 N. H. 143, 82 Am. Dec. 201.

[4] Woodman v. Tufts, 9 N. H. 88; Johnson v. Lewis, 12 Conn. 307; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Morris Canal & B. Co. v. Ryerson, 27 N. J. L. 457; Beavers v. Trimmer, 25 id. 97; McDonough v. Gilman, 3 Allen, 264, 80 Am. Dec. 72; Thornton v. Smith, 11 Minn. 15; Waggoner v. Jermaine, 3 Denio, 306, 45 Am. Dec. 481; Hubbard v. Russell, 24 Barb. 404; Townes v. Augusta, 52 S. C. 396, 29 S. E. Rep. 851; De Laney v. Georgia, etc. R. Co., 58 S. C. 357, 36 S. E. Rep. 699.

An action lies against one who continues a nuisance erected by another, and who actively maintains it, without notice or request to abate it. Whitenack v. Philadelphia & R. R. Co., 57 Fed. Rep. 901, following Morris Canal & B. Co. v. Ryerson, 27 N. J. L. 457.

In an Iowa case it is said, the question of the grantee being requested to abate a nuisance having been urged, "without deciding this question, we may say the evidence shows that defendant had sufficient notice, and took no steps to prevent the damage until after this action was commenced." Hunt v. Iowa Central R. Co., 86 Iowa, 15, 23, 52 N. W. Rep. 668, 41 Am. St. 473.

It is implied at least in Ahern v. Steele, 115 N. Y. 203, 22 N. E. Rep. 193, 12 Am. St. 778, 5 L. R. A. 449, that notice to the owner of demised premises of the existence of a nuisance may be sufficient to make him responsible for the consequences of it.

ises held by him, which is a nuisance to a third person, is concerned. But as to a tenant the rule is otherwise.[1] The doctrine that a purchaser is not liable for a nuisance until he is requested to remove it has no application where it will benefit one who was instrumental in creating the nuisance.[2] Where the nuisance was caused by jetties in a river which were not upon the property of the company which built them, a company which afterwards bought the railroad without assuming any liability to keep the jetties in repair was not liable for the injury they produced merely because it did not remove or repair them.[3]

According to the American cases a landlord is not relieved of liability for an existing nuisance on premises which he demises by a condition in the lease thereof that the tenant shall keep them in repair.[4] There are, however, English adjudications to the contrary.[5] If a nuisance is the result of the joint acts of a lessor and lessee, they are jointly liable for both permanent and temporary injury sustained after the lease was made.[6] In New York a majority of the court of appeals has decided, in a carefully considered case, that, generally and *prima facie*, where lands are in the occupation of a tenant he alone is responsible for any nuisance thereon arising from their being out of repair; that the landlord is only liable where he demised the premises with the nuisance thereon, or covenanted to repair, and that a grantee or devisee of premises upon which there is a nuisance at the time the title passes is not responsible therefor until he has had notice thereof.[7] A

[1] Meyer v. Harris, 61 N. J. L. 83, 38 Atl. Rep. 690.

[2] Steinke v. Bentley, 6 Ind. App. 663, 34 N. E. Rep. 97.

[3] Fordyce v. Russell, 59 Ark. 312, 27 S. W. Rep. 82, citing Wayland v. St. Louis, etc. R. Co., 75 Mo. 548; Walter v. Wicomico County, 35 Md. 385; Morris Canal & B. Co. v. Ryerson, 27 N. J. L. 457.

[4] Ingwersen v. Rankin, 47 N. J. L. 18, 54 Am. Rep. 109; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295.

[5] Pretty v. Bickmore, L. R. 8 C. P. 401; Gwinnell v. Eamer, L. R. 10 C. P. 658.

[6] Railroad Co. v. Hambleton, 40 Ohio St. 496.

A landlord is liable to the owner of adjoining land occupied by tenants, though they cause the nuisance, if the premises or some part of them are so constructed that their constant use will necessarily result in the creation of a nuisance, or if he permits them to remain in an unsanitary condition if he has the power to remedy the grievance. Park v. White, 23 Ont. 611.

[7] Ahern v. Steele, 115 N. Y. 203, 22 N. E. Rep. 193, 12 Am. St. 778, 5 L. R. A. 449.

landlord who has neither possession nor control of leased premises and who has not advised or consented to the doing of an act which has caused a nuisance is not liable therefor.[1] The rule that any person injured by a continuing nuisance can maintain an action against the land-owner who created it, or against a grantee who continues it, is subject to the provision that the grantee, if he merely suffers it to remain, must first be asked to abate it, implies that he has the power to do so.[2] A lessee is a grantee within this rule.[3] "If the nuisance is created by a tenant or a former owner who has let the premises to a tenant, a grantee subject to the tenancy in consequence of the purchase and the subsequent receipt of rent is not made liable to third persons for the use which the tenant continues to make of the premises, even if it constitutes a nuisance. When a landlord lets premises with a nuisance upon them, the case is somewhat different. If the condition of the premises of itself is such as to constitute a nuisance, it has been held that by the letting the landlord authorizes the continuance of the nuisance. If the premises are a nuisance not in themselves, but in consequence of the use made of them by the tenant, then the question is whether this use is authorized by the landlord. If the premises can be used by the tenant in the manner intended by the landlord, either as shown by the construction of the premises, or by the terms of the lease, or by other evidence, without becoming a nuisance, the landlord is not liable for the acts or neglect of the tenant which creates the nuisance. If the tenant creates the nuisance without authority of the landlord, and after he has entered into occupation as tenant, the landlord is not liable.[4]

§ 1036. General principles of the law of nuisance. For the purpose of discussing the subject of damages it is not necessary to state the technical difference between nuisance and the wrong called trespass, for the same rules of damage [396] apply in both cases. Trespass is susceptible of very precise definition, but such a variety of wrongs come under the de-

[1] Baker v. Allen, 66 Ark. 271, 50 S. W. Rep. 511, 74 Am. St. 93.

[2] Prentiss v. Wood, 132 Mass. 486.

[3] McDonough v. Gilman, 3 Allen, 264, 80 Am. Dec. 72.

[4] Lufkin v. Zane, 151 Mass. 117, 31 N. E. Rep. 757, 34 Am. St. 262, 17 L. R. A. 251, approving Dalay v. Savage, 145 Mass. 38, 12 N. E. Rep. 841, 1 Am. St. 429.

nomination of nuisance that all definitions of it must, in the nature of things, be very general. The remedy against a nuisance by action for damages merely would be, in many instances, imperfect and inadequate because full redress cannot be obtained in a single action. For this reason resort may be had to equity for prevention by injunction; and provision is very generally made by statute for judicial abatement at law, in addition to the award of damages.[1] A nuisance is generally of a continuing nature by the continuous fault of the person creating it; though it may be so by the fault of some other person who has become so connected with it as to be also answerable for it. This continuous fault may consist in a repetition of affirmative acts, keeping alive and perpetuating the nuisance, or in neglect to remove one which otherwise would, of itself, continue. The wrong in the latter case is in omitting to perform the necessary act to cause the nuisance to cease, when the doing of such act is a legal duty.[2] Every man has a right to use his own property as to him seems proper, subject to the important qualification that he so use it as not to injure another. Nuisances may be, and generally are, created and continued on the pretext of the wrong-doer using his own property to make the same conducive to his profit and enjoyment, and by neglecting the legal restriction of that use to avoid injury to others. If he carry on a lawful trade or business in such a manner that it becomes a nuisance to his neighbor he must answer in damages.[3]

[1] Remington v. Foster, 42 Wis. 608; Davis v. Lambertson, 56 Barb. 480.

[2] Fish v. Dodge, 4 Denio, 317, 47 Am. Dec. 254; Smith v. Elliott, 9 Pa. 345; Holmes v. Wilson, 10 Ad. & E. 503; Bowyer v. Cook, 4 M., G. & S. 236; Loweth v. Smith, 12 M. & W. 582; Thompson v. Gibson, 7 id. 456; Staple v. Spring, 10 Mass. 74; Cumberland & O. Canal Co. v. Hitchings, 65 Me. 140; Esty v. Baker, 48 id. 495; Russell v. Brown, 63 id. 203.

[3] Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Columbus Gas, etc. Co. v. Freeland, 12 Ohio St. 392; Keiser v. Mahanoy City Gas Co., 143 Pa. 276, 22 Atl. Rep. 759; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 63 Am. St. 533, 39 Atl. Rep. 270; St. Helen's Smelting Co. v. Tipping, 11 H. of L. Cas. 642.

The test as to whether a noisy trade is a nuisance in a particular locality and to a particular person is, will it be likely to be physically injurious to a person of ordinary sensibilities, or is it carried on at such unreasonable hours as to disturb the repose of people dwelling within its sphere? McCann v. Strang, 97 Wis. 551, 72 N. W. Rep. 1117.

§ 1037. Wrong-doer liable for at least nominal damages. The creation or continuance of a nuisance in any form which involves the physical invasion of or interference with [397] the plaintiff's property is a wrong for which an action will lie, and at least nominal damages may be recovered.[1] But when the act complained of is lawful in itself a different rule prevails. It is then only when some actual injury is done that a right of action ensues,[2] unless the nuisance is of a permanent character and its construction and continuance are necessarily an injury, in which case the right of action accrues upon its construction.[3] Every man has a right to use his own as to himself seems proper; but he must be careful to so use it that no injury is done to another. If the thing complained of as a nuisance causes neither hurt, inconvenience, annoyance nor damage, it is not a nuisance; but if it causes either in a material degree the person creating it must be liable for the consequences, no matter how small the damage. The person sustaining it will have a right of action, but there must have been some damage in fact, not merely in imagination.[4] "It may be stated as a general doctrine that, in order to constitute a nui-

[1] Clark v. Pennsylvania R. Co., 145 Pa. 438, 22 Atl. Rep. 989, 27 Am. St. 710; Alexander v. Kerr, 2 Rawle, 83, 19 Am. Dec. 616; Foote v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Jones v. Hannovan, 55 Mo. 462; Phillips v. Phillips, 34 N. J. L. 208; Butman v. Hussey, 12 Me. 407; Freudenstein v. Heine, 6 Mo. App. 267; Chatfield v. Wilson, 27 Vt. 670; Hilliard on Torts, 608; Casebeer v. Mowry, 55 Pa. 419. 93 Am. Dec. 766; Farley v. Gates City Gas Light Co., 105 Ga. 323, 31 S. E. Rep. 193.

"No one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury." East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. Rep. 631, quoting from Merritt v. Packer, 1 N. J. L. 496, 533.

[2] Van Orsdol v. B., C. R. & N. R. Co., 56 Iowa, 470, 9 N. W. Rep. 379; Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 1010, 24 S. E. Rep. 730, 32 L. R. A. 708; Augusta v. Lombard, 101 Ga. 724, 28 S. E. Rep. 994.

[3] St. Louis, etc. R. Co. v. Biggs, 52 Ark. 240, 12 S. W. Rep. 331, 6 L. R. A. 804; Same v. Anderson, 62 Ark. 360, 35 S. W. Rep. 791; Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233, 46 N. E. Rep. 591; Missouri, etc. R. Co. v. Graham, 12 Tex. Civ. App. 54, 33 S. W. Rep. 576.

[4] Cooper v. Hall, 5 Ohio, 322; McElroy v. Goble, 6 Ohio St. 187; Elliot v. Fitchburg R. Co., 10 Cush. 191, 57 Am. Dec. 85; Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315; Stadler v. Grieben, 61 Wis. 500, 21 N. W. Rep. 629; Pennoyer v. Allen, 56 Wis. 511, 14 N. W. Rep. 609, 43 Am. Rep. 728; Sturges v. Bridgman, 11 Ch. Div. 852; Churchill v. Burlington Water Co., 94 Iowa, 89, 62 N. W. Rep. 646; McCann v. Strang, 97 Wis. 551, 72 N. W. Rep. 1117; Euler v. Sullivan,

sance from the use of one's property, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable and inconvenient."[1] In Columbus Gas, etc. Co. v. Freeland[2] Gholson, J., said: "It is evident that what amount of annoyance or inconvenience will constitute a legal injury, resulting in actual damage, dependent on varying circumstances, cannot be precisely defined, and must be left to the good sense and sound discretion of the tribunal called upon to act. Any rule on the subject can only serve as a guard against an unreasonable exercise of that discretion. Thus, in the one above cited,[3] we are cautioned to regard the proper mean, the ordinary standard of comfort and convenience, and not particular or exceptional cases above, nor, it may be added, below. Regard should be had to the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities. What such persons would not regard as an inconvenience materially interfering with their physical comfort may be properly attributed, when alleged to be a nuisance, to the fancy or fastidious taste of the party. On the other hand, the charge of a nuisance, if it be of a thing offensive to persons generally, cannot be escaped by showing that to some [398] persons it is not at all unpleasant or disagreeable."[4] In Thompson v. Crocker,[5] the action being brought for inconvenience to the plaintiff in working his mill caused by increasing the water below it by the defendant's dam, the judge instructed the jury that if the plaintiff had sustained any actual perceptible damage in consequence of the erection of the dam he was entitled to recover, but that for a theoretic injury or damage to be inferred from the obstruction of the water, and

75 Md. 616, 23 Atl. Rep. 845, 32 Am. St. 420; Berlin v. Thompson, 61 Mo. App. 234.

In Ohio it is said that the least degree of hurt, inconvenience, annoyance or damage resulting from the use of property is a nuisance. Cooper v. Hall, 5 Ohio, 322.

[1] Lane v. Concord, 70 N. H. 485, 49 Atl. Rep. 687, 85 Am. St. 643, and cases cited.

[2] 12 Ohio St. 392.

[3] Soltau v. De Held, 2 Sim. (N. S.) 133.

[4] Price v. Grautz, 118 Pa. 402, 11 Atl. Rep. 794, 4 Am. St. 601; Cooley on Torts, 600; First Baptist Church v. Schenectady, etc. R. Co., 5 Barb. 79; St. Helen's Smelting Co. v. Tipping, 11 H. of L. Cas. 642.

[5] 9 Pick. 59.

from the principle that any obstruction below would prevent the water from passing from the plaintiff's mill so rapidly as it would without such obstruction, the defendant was not answerable.[1] In such cases the cause of action depends on actual damage, and the statute of limitations begins to run from the time when such damage occurs.[2]

§ 1038. Usually a continuous wrong requiring successive actions. Successive actions may be brought if the nuisance continues by the continuous fault of the defendant. In the first action the question whether the acts complained of constitute a nuisance or not is to be determined; and where there is no ground for imputing any wanton or intentional wrong the damages are confined to the actual injury from the nuisance and its continuance to the date of the writ.[3] If it continues afterwards the damages resulting therefrom can only be recovered by a new suit, and they may be so recovered, for every continuance of the nuisance is a new nuisance.[4] In such

[1] See Oakley Mills, etc. Co. v. Neese, 54 Ga. 459.

[2] Delaware, etc. Canal Co. v. Wright, 21 N. J. L. 469; Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792. See Wells v. New Haven & N. Co., 151 Mass. 46, 23 N. E. Rep. 724, 21 Am. St. 423.

[3] Under the California code damages may be awarded for a detriment to real estate though they accrued after the action was begun; a supplemental pleading is not necessary. Hicks v. Drew, 117 Cal. 305, 49 Pac. Rep. 189.

[4] Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 Sup. Ct. Rep. 185; Stadler v. Grieben, 61 Wis. 500, 21 N. W. Rep. 629; Cole v. Sprowl, 35 Me. 161, 56 Am. Dec. 696; Vedder v. Vedder, 1 Denio, 257; Blunt v. McCormick, 3 id. 283; Savannah & O. Canal Co. v. Bourquin, 51 Ga. 378; Bare v. Hoffman, 79 Pa. 71, 21 Am. Rep. 42; Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642; Anderson, etc. R. Co. v. Kernodle, 54 Md. 314; Freudenstein v. Heine, 6 Mo. App. 287; Whitmore v. Bischoff, 5 Hun, 176; Hopkins v. Western Pacific R. Co., 50 Cal. 190; Hartz v. St. Paul, etc. R. Co., 21 Minn. 358; Sackrider v. Beers, 10 Johns. 241; Duncan v. Markley, Harp. 179; Cumberland & O. Canal Co. v. Hitchings, 65 Me. 140; Allen v. Worthy, L. R. 5 Q. B. 193; Queen v. Waterhouse, L. R. 7 Q. B. 545; Mahon v. New York, etc. R. Co., 24 N. Y. 658; Thayer v. Brooks, 17 Ohio, 489; Slight v. Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476; Steinke v. Bentley, 6 Ind. App. 663, 34 N. E. Rep. 97; Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. Rep. 909, 54 Am. St. 522; Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. Rep. 282; Covert v. Brooklyn, 13 App. Div. 188, 43 N. Y. Supp. 310; Toledo v. Lewis, 17 Ohio Ct. Ct. 588; Chattanooga v. Dowling, 101 Tenn. 342, 47 S. W. Rep. 700; Rogers v. Coal River Boom & Driving Co., 39 W. Va. 272, 19 S. E. Rep. 401; Nanson v. Maffra, 7 Vict. L. R. (law) 364; Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. Rep. 693, 34 Am. St. 92; citing the text; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. Rep. 925, 43

subsequent action all damages for such continuance since the [399] commencement of the prior action are recoverable; and the defendant will be regarded, for such continued wrong, as wilful and contumacious, and subject to such exemplary damages as may insure the abatement of the nuisance.[1] Under the practice in New York where the defendant has no power to condemn the injured property the owner may sue at law for damages or bring a suit in equity for an injunction and damages. In the action at law damages cannot be recovered beyond the time of the commencement of the action; successive actions may be brought until the nuisance is abated. In the suit in equity damages are recoverable up to the entry of judgment, and an injunction is issued against continuing the nuisance.[2]

§ 1039. What recoverable in the first action. In the first action all damages may be recovered which have resulted from the nuisance, and which will ensue without any further fault, neglect or positively wrongful act of the defendant. If he is subject to successive actions until he removes the nuisance, then, of course, in the first action nothing can be included in the recovery which will enter into the estimate of damages in any subsequent suit. For illustration, suppose a business is conducted which causes discomfort and annoyance to others. That injury will continue so long as the offensive

Am. St. 711; Garrett v. Wood, 57 App. Div. 242, 68 N. Y. Supp. 157; St. Louis, etc. R. Co. v. Biggs, 52 Ark. 240, 12 S. W. Rep. 331, 6 L. R. A. 804; Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233, 46 N. E. Rep. 591; Mulligan v. Augusta, 115 Ga. 337, 41 S. E. Rep. 604; Doran v. Seattle, 24 Wash. 182, 64 Pac. Rep. 230; Pickens v. Coal River Boom & T. Co., — W. Va. —, 41 S. E. Rep. 400; Bennett v. Marion, — Iowa, —, 93 N. W. Rep. 558.

The damages recoverable in a subsequent suit cannot include those which accrued before the commencement of intermediate suits though these were discontinued in reliance on the defendant's promise to abate the nuisance. Garrett v. Wood, 55 App. Div. 281, 67 N. Y. Supp. 122.

The damages recovered in the first suit are wholly independent of those subsequently sued for, and cannot mitigate them. Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 Sup. Ct. Rep. 185.

[1] Bradley v. Amis, 2 Hayw. 399; Cumberland & O. Canal Co. v. Hitchings, 65 Me. 140; Standard Oil Co. v. Kinnaird, 13 Ky. L. Rep. 269 (Ky. Super. Ct.); Pickens v. Coal River Boom & T. Co., — W. Va. —, 41 S. E. Rep. 400.

[2] Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. Rep. 282.

business is conducted; each day's business produces a day's discomfort; the business and annoyance are continuing cause and effect. In the first suit for such nuisance it cannot be proved, nor will the law assume, that the wrong and injury will continue. If in fact it is continued during the pendency of the action it is a wrong not in issue; it is a new wrong and the resulting damage is a fresh cause of action. So if a person has erected a dam or embankment on his own land or elsewhere and thereby water to which another is entitled is diverted from his property; or by such means his property is flooded or otherwise injured the injury will continue so long as the dam or embankment is maintained. If it is permanent the injury will also be so unless the cause is removed, and if the law requires the defendant to remove the cause every day he neglects that duty he is guilty of continuing the nuisance and successive actions may be brought. According to the general current of decision and on principle this is a continuous wrong; for if, on such or a similar case, the plaintiff is compelled to assess his damages once for all he is precluded from bringing a second suit, though the damage may turn out to be greater than the recovery.[1] The general rule is recog-

[1] Fowle v. New Haven & N. Co., 112 Mass. 334, 17 Am. Rep. 106; Wilkins v. Monson Consolidated Slate Co., 96 Me. 385, 52 Atl. Rep. 755; Illinois, etc. R. Co. v. Grabill, 50 Ill. 241; Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667; Uline v. New York, etc. R. Co., 101 N. Y. 116, 4 N. E. Rep. 536; Tallman v. Metropolitan E. R. Co., 121 N. Y. 119, 23 N. E. Rep. 1134, 8 L. R. A. 173; Cleveland, etc. R. Co. v. King, 23 Ind. App. 573, 55 N. E. Rep. 875, citing the text; New Albany v. Lines, 21 Ind. App. 380, 51 N. E. Rep. 346; Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. Rep. 26; Hudson v. Burk, 48 Mo. App. 314; Railway Co. v. Cook, 57 Ark. 387, 21 S. W. Rep. 1066; Cleveland, etc. R. Co. v. Pattison, 67 Ill. App. 351; Bailey v. Heintz, 71 Ill. App. 189; Sanitary District v. Ray, 85 Ill. App. 115; Rarey v. Lee, 7 Ind. App. 518, 34 N. E. Rep. 749; Bowers v. Mississippi & Rum River Boom Co., 78 Minn. 398, 81 N. W. Rep. 208; Pinney v. Berry, 61 Mo. 359; Van Hoozier v. Hannibal & St. J. R. Co., 70 Mo. 145; Dickson v. Chicago, etc. R. Co., 71 Mo. 575; Markt v. Davis, 46 Mo. App. 272; Carson v. Springfield, 53 Mo. App. 289; Hole v. Chard Union, [1894] 1 Ch. 293; McKee v. St. Louis, etc. R. Co., 49 Mo. App. 174; Ready v. Missouri Pacific R. Co., — Mo. App. —, 72 S. W. Rep. 142.

If the nuisance complained of is abated before trial damages for a permanent injury cannot be recovered. Foote v. Burlington Water Co., 94 Iowa, 200, 62 N. W. Rep. 648.

It is said in an Illinois case, there is much confusion among the authorities respecting the cases in which successive actions will lie, and those in which only one action may

nized by all the cases. The divergence of views arises in determining whether the particular nuisance is permanent or not. Some courts lay down as a test the right to abate the nuisance; if it may be abated by law it is not to be regarded as permanent, but as continuing, and damages may be recovered from time to time.[1] The converse of this rule is well illustrated where the nuisance is caused by a dam or other structure erected in pursuance of law, and the injury results without negligence in its operation or maintenance. In such cases all the damages must be recovered in one action.[2]

In all cases of doubt respecting the permanency of the injury courts are inclined to favor the right to bring successive

be maintained. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as permanent. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrue up to the date of bringing suit. Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. We think the more correct view is presented in the former class of cases. Schlitz Brewing Co. v. Compton, 142 Ill. 511, 515, 32 N. E. Rep. 693, 34 Am. St. 92. The opinion refers to the following cases as sustaining the rule favored by it: Uline v. New York, etc. R. Co., 101 N. Y. 98, 4 N. E. Rep. 536; Duryea v. Mayor, 26 Hun, 120; Blunt v. McCormick, 3 Denio, 283; Reed v. State, 108 N. Y. 407, 15 N. E. Rep. 735; Hargreaves v. Kimberley, 26 W. Va. 787; Ottenot v. New York, etc. R. Co., 119 N. Y. 603, 23 N. E. Rep. 169; Cobb v. Smith, 38 Wis. 81; Delaware & R. Canal Co. v. Wright, 21 N. J. L. 469; Wells v. New Haven & N. Co., 151 Mass. 46, 23 N. E. Rep. 724, 21 Am. St. 423; Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. Rep. 365; Silsby Manuf. Co. v. State, 104 N. Y. 562, 11 N. E. Rep. 264; Aldworth v. Lynn, 153 Mass. 53, 26 N. E. Rep. 229, 10 L. R. A. 210, 25 Am. St. 608; Troy v. Cheshire R. Co., 23 N. H. 33, 55 Am. Dec. 177. The writer of the opinion added: We do not wish to be understood as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character.

[1] Baker v. Leka, 48 Ill. App. 353; Stein v. Lafayette, 6 Ind. App. 414, 33 N. E. Rep. 912.

[2] Centralia v. Wright, 156 Ill. 561, 41 N. E. Rep. 217; Pinckneyville v. Hutchings, 63 Ill. App. 137; Baltimore v. Merryman, 86 Md. 584, 39 Atl. Rep. 98. But see Bowers v. Mississippi & Rum River Boom Co., 78 Minn. 398, 81 N. W. Rep. 208, stated in § 1042.

actions. Otherwise the effect would be to give the defendant, because of his wrongful act, the right to continue the wrong; a right equivalent to an easement. A right to land cannot thus be acquired.[1] On the other hand, such a principle would involve the injustice of compelling the defendant to pay for a perpetual wrong which he would, perhaps, put an end to at once on the adjudication that the erection is a nuisance.[2] In a late case in Pennsylvania[3] the parties were owners of tanneries on opposite sides of the same stream, the defendant's being the lower one. The plaintiff was the owner of land on each side of the stream below both tanneries. He had a dam from which he conducted water to his tannery; the defendant made a dam below into which the surplus water from plaintiff's dam flowed; from this dam the defendant conducted the water to his tannery by means of a pipe, by which the plaintiff lost the use of the water required to carry offal from his tannery. The court say: "A severance of the connection of the pipe with the stream would cause the water to run in its accustomed channel and remove the whole cause of complaint. It is not a case of an entry on another's land and a severance of a part of the freehold, nor the depositing a permanent nuisance thereon." The act committed was not of such a permanent character that it could be assumed to continue through all coming time and to justify the assessment of damages accordingly. It was, therefore, deemed error to permit evidence to be given of a permanent injury to the market value of the tannery, and to instruct the jury that the plaintiff was entitled to recover the permanent damage done to the freehold. He was deemed entitled to the damages he had sustained prior to the commencement of the suit, and to be entitled to them as of that date; and the jury were permitted to compute interest thereon down to the verdict.[4] Where the defendant filled up about two hundred yards of the plaintiff's canal bed [401]

[1] Atlantic, etc. R. Co. v. Robbins, 35 Ohio St. 531; Thompson v. Morris Canal & B. Co., 17 N. J. L. 480; Anderson, etc. R. Co. v. Kernodle, 54 Ind. 314.

[2] Baker v. Allen, 66 Ark. 271, 50 S. W. Rep. 511, 74 Am. St. 93.

[3] Bare v. Hoffman, 79 Pa. 71, 21 Am. Rep. 42; Duryea v. Mayor, 26 Hun, 120.

[4] The reason for the allowance of interest was deemed the same as in the prior cases of Railroad Co. v. Gesner, 20 Pa. 240; Pennsylvania R. Co. v. Cooper, 58 id. 408; Delaware, etc. R. Co. v. Burson, 61 id. 369.

without authority, but under color of official power, to make a street, it was held to be a nuisance erected on the plaintiff's land, which it was the duty of the defendant to remove; that successive actions could be brought until such removal; that in one action it was wrong to give as damages the diminution of the value of the property, as that would lead to an erroneous result.[1] If damages are sustained subsequently to the commencement of the action they may be considered if they are the natural and necessary result of the act complained of,[2] and are not in themselves sufficient as a ground for a separate suit.[3] In Iowa facts which occur after the commencement of an action and which merely strengthen, develop or reinforce the original cause of action, or enlarge the extent of or change the relief sought may be introduced by a supplemental petition although they would support an independent action.[4]

§ 1040. Continuing liability of the person who causes it. The continuing liability of the erector of a nuisance which consists of a permanent structure is very strongly illustrated by an English adjudication, made in an action on the case for continuing a nuisance to the plaintiff's market by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected under the superintendence and direction of the defendants, though not on their own land, but on land of the corporation of K. The plaintiff became a lessee of the market after the erection of the encroaching building. It was contended on behalf of the defendants that they were not responsible for the continuing of the nuisance; that they were distinct persons from the corporation; and that, though they were guilty of erecting, they could not be considered as having continued the nuisance because they were not in possession or interested in the soil on which the building stood. Parke, B., said: "That the defendants were responsible for some consequences of the original erection of the building to

[1] Cumberland & O. Canal Co. v. Hitchings, 65 Me. 140. See Dority v. Dunning, 78 id. 381, 6 Atl. Rep. 6; Stadler v. Grieben, 61 Wis. 500, 21 N. W. Rep. 629; Benson v. Chicago & A. R. Co., 78 Mo. 504.

[2] Goodrich v. Dorset Marble Co., 60 Vt. 280, 13 Atl. Rep. 636; Central of Georgia R. Co. v. Windham, 126 Ala. 552, 28 So. Rep. 392.

[3] Frostburg v. Dufty, 70 Md. 47, 55, 16 Atl. Rep. 642.

[4] Foote v. Burlington Gaslight Co., 103 Iowa, 576, 72 N. W. Rep. 755.

the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation they would be liable just as the servant of an individual is if he is actually concerned in erecting the nuisance; and as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market, or what limit can be assigned to their responsibility other than the continuance of the injury itself? Is he who originally erects a wall by which ancient lights are [402] obstructed to pay damages for the loss of the light for the first day only? Or does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? And if the then owner of the market might have maintained the action against the defendants for the injury to his franchise for the whole period during which the defendants' act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for it is clearly established that he has a right of action for every continuing nuisance. . . . It was also said that the defendants could not now remove the nuisance themselves without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it without exposing themselves to another action."[1] Erecting the nuisance was not deemed the entire wrong; that was done to the owner; the continuance of it was a distinct and additional wrong, and gave cause for an action to the succeeding tenant.[2]

One who erects a structure or construction which creates a nuisance and then conveys to another his title and the lands

[1] Thompson v. Gibson, 7 M. & W. 456 See Blunt v. Aikin, 15 Wend. 522, 30 Am. Dec. 72.

[2] See Russell v. Brown, 63 Me. 203; Plummer v. Harper, 3 N. H. 88; Esty v. Baker, 48 Me. 495; Bowyer v. Cook, 4 M., G. & S. 236; Holmes v. Wilson, 10 Ad. & E. 503; Pickens v. Coal River Boom & T. Co., — W. Va. —, 41 S. E. Rep. 400.

and premises on which the structure or construction exists and is maintained, with a covenant in the deed of conveyance for quiet enjoyment and right to maintain such structure or construction, is liable for the continuance of the nuisance upon the ground that he affirms it and must be regarded in law as continuing it.[1] In some states the continuance of a dam flooding the plaintiff's property is ground for successive actions as for a continuous wrong.[2] Where the nuisance was caused to the plaintiff's tillable land by casting water thereon, and resulted from a cause intended to be perpetually operative and of a nature to operate gradually and continuously, the rule was declared that if the effect of the nuisance was to destroy wholly and permanently the fertility of the land, so that abating the nuisance would not restore the land and render it again fertile, the right to maintain successive actions relative to subsequent years ceased, and that a single action and recovery for such destruction could be maintained and would be final; but that, until such result followed, successive actions were maintainable for the annual damage.[3] The defendant was engaged in supplying water to manufacturers for business uses, and for that purpose constructed a system of canals, from which races led to the establishments served; water gates controlled the flow of water in the races. The gate which supplied the plaintiff's foundry was removed, and he, in times when the water was high, was injured by the discharge of large quantities of water upon his premises. The wrong done was not by the removal of the gate, but by the discharge of the water, and each discharge which caused damage gave a new cause of action.[4] The occupation of the plaintiff's land or of a street adjacent thereto for a railroad is ground for successive actions as for continuous wrong in some jurisdictions;[5] in others the contrary rule prevails.[6] A nuisance produced by a private erection or other work on land will not be regarded

[1] East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. Rep. 631.

[2] Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Staple v. Spring, 10 Mass. 72. *Contra*, Bizer v. Ottumwa Hydraulic Power Co., 70 Iowa, 145, 30 N. W. Rep. 172.

[3] Danielly v. Cheeves, 94 Ga. 263, 21 S. E. Rep. 524.

[4] Augusta v. Lombard, 101 Ga. 724, 28 S. E. Rep. 994.

[5] Mahon v. New York Central R. Co., 24 N. Y. 658; Sherman v. Milwaukee, etc. R. Co., 40 Wis. 645.

[6] § 1042.

as permanent, no matter what the intention was when the work was done.[1]

§ 1041. Damages may include future expenditures. The authorities agree that damage done at the date of the writ is to be compensated, and that only. If that damage consists in causing the party to expend money the test is not the time when the expenditures were made, for they may be paid at once or their payment delayed without in any way affecting the rights of the parties. The question is not when the money was paid, whether before or after suit; but was the lia- [403] bility to those expenditures occasioned by the acts complained of? Or was it by the continuance of the same acts, or of the state of things produced by those acts, after the action was brought? If they are the result and consequence of the wrongful act complained of they are to be recovered in that action; if they result from the wrongful continuance of the state of facts produced by those acts they form the basis of a new action.[2]

§ 1042. When nuisance not a continuous wrong. When a wrongful act is done which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independently of any subsequent wrongful act, then all the damages resulting, both before and after the commencement of the suit, may be recovered in one action.[3] Thus in a Minnesota case, in which it was held that occupying land for a railroad was a continuing wrong, the court say: "If the construction of the road and track on the plaintiff's

[1] Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. Rep. 693, 47 Alb. L. J. 28, 34 Am. St. 92, citing the text; Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. Rep. 282; Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. Rep. 730, 32 L. R. A. 708.

[2] Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177; Holmes v. Wilson, 10 Ad. & E. 503; Staple v. Spring, 10 Mass. 72; O'Riley v. McChesney, 3 Lans. 278, affirmed, 49 N. Y. 672.

[3] Chicago, etc. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. Rep. 460; Same v. Schaffer, 26 Ill. App. 280; Comminge v. Stevenson, 76 Tex. 642, 13 S. W. Rep. 556; Cooper v. Randall, 59 Ill. 321; Hayden v. Albee, 20 Minn. 159; Centralia v. Wright, 156 Ill. 561, 41 N. E. Rep. 217; Hyde Park Thomson-Houston Light Co. v. Porter, 167 Ill. 276, 47 N. E. Rep. 206, 64 Ill. App. 152; Lake Erie & W. R. Co. v. Purcell, 75 Ill. App. 573; Powers v. St. Louis, etc. R. Co., 158 Mo. 87, 57 S. W. Rep. 1090; Paris v. Allred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62; Aberdeen v. Bradford, 94 Md. 670, 682, 51 Atl. Rep. 614; Coleman v. Bennett, — Tenn. —, 69 S. W. Rep. 734.

land necessarily lessened the value of the property, that is to say, if it would be worth less because of the mere existence thereon of said road-bed and track, without reference to any wrongful use which the defendant might or might not make of them, such depreciation accrued immediately upon the construction thereof, and was in its nature permanent; and being a direct and immediate result of the trespass might be recovered at once. And if such erection necessarily caused the surface water to stand upon plaintiff's land and run into his cellar and well, he could recover therefor in the same action; though such injury might not accrue for some time after the completion of the road-bed and track."[1] Where a railroad company built a permanent approach to its track in front of the plaintiff's lot, destroying his right of egress and ingress therefrom to the street, and at the same time flooded his lot by means of an improper culvert, he recovered in the same action for all the damages. Correct pleading required that the statement of the several items of damages be made in separate counts.[2] If the injury to real estate is in the nature of waste, as where

[1] Adams v. Hastings, etc. R. Co., 18 Minn. 265; Chicago & A. R. Co. v. Maher, 91 Ill. 312. The Minnesota case cited has been followed in several instances. Brakken v. Minneapolis, etc. R. Co., 29 Minn. 41, 11 N. W. Rep. 124; Byrne v. Same, 38 Minn. 212, 36 N. W. Rep. 339, 8 Am. St. 668; Adams v. Chicago, etc. R. Co., 39 Minn. 286, 39 N. W. Rep. 629, 12 Am. St. 644, 1 L. R. A. 493; Lamm v. Same, 45 Minn. 71, 47 N. W. Rep. 455, 10 L. R. A. 268; Bowers v. Mississippi & Rum River Boom Co., 78 Minn. 398, 81 N. W. Rep. 208.

In the case last cited the defendant placed in the river, opposite the plaintiff's farm, but not upon it, piling to facilitate the floating of logs, and maintained it there. The effect of the piling was to turn water, logs and ice upon the plaintiff's land and to wash it away. Previously to the bringing of the action in question the plaintiff had recovered a judgment which had been satisfied. It was contended that such judgment was a bar to the second action. This contention was overruled. It was sought to distinguish the case from the earlier ones cited on the ground that the piling was so placed in pursuance of law, and that no claim of negligence was made against the defendant. The answer was: All these facts may be conceded, and still the act of the defendant in maintaining the piling be a continuing nuisance as to the plaintiff. The obstruction was lawful as to the public, but the legislature could not authorize the defendant to maintain it against a private party whom it injured. Huesston v. Mississippi & R. R. Boom Co., 76 Minn. 251, 79 N. W. Rep. 92. The fact that the obstruction did not physically touch the plaintiff's land is immaterial; his damages are just as great as if some part of the obstruction rested on his land.

[2] Wallace v. Kansas City & S. R. Co., 47 Mo. App. 491.

a building is demolished, trees destroyed or fences broken down, there is no legal obligation or duty resting upon the wrong-doer to abate the wrong or repair the mischief. He is liable only for the damages. Only one action then can [404] be maintained, and he is liable in that for the whole damage, prospective as well as retrospective.[1]

Damages have not been invariably assessed as for a continuing wrong where deposits of soil or other substances have been made on another's land, or other encroachment made thereon of a nature to continue unless active measures are taken for their removal. If the process of deposit goes on and there is a continued accretion of foreign matter by defendant's fault successive actions may, of course, be brought, but it is not the uniform American rule to regard the wrong of making the deposit and that of its continuance on the land as distinct or divisible wrongs. Thus, in an action by the owners of a water-power against the owner of a tannery higher up the stream for permitting tan bark to be conveyed into the plaintiff's pool to the detriment of his mill, the court, recognizing that the rule for measuring damages is that which aims at actual compensation for the injury and that whatever ascertains this is proper evidence for the jury, held that the plaintiff was entitled to permanent damages; in other words, to recover all his damages in one action, measured either by the depreciation of the value of his property or by the cost of removing the deposit.[2] Agnew, J., said: "The owner of the freehold may undoubtedly recover for an injury which permanently affects or depreciates his property. . . . Being the owner of the property, and in its actual possession and

[1] Cumberland & O. Canal Co. v. Hitchings, 65 Me. 140.

The doctrine stated does not apply where the only physical injury to the premises is the pollution of the water in a well thereon; it is presumed that the defendant will discontinue the nuisance which produces that result. Cleveland, etc. R. Co. v. King, 23 Ind. App. 573, 585, 55 N. E. Rep. 875.

In Babb v. Curators of State University, 40 Mo. App. 173, realty was damaged by the discharge of sewage upon it. It was contended that because the nuisance was discontinued there could be no recovery for permanent depreciation in the value of the land. This view was disapproved and a recovery therefor was allowed as well as for loss of rents up to the time suit was brought.

[2] Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642.

use, . . . (the plaintiff) . . . had a right to all the damages flowing directly from the tort of the defendant. If, therefore, a permanent injury was created by the lodgment of the tan bark in the pool of their dam which actually depreciates the property in value as a water-power it must affect the value of the land to which it belongs; and why should not this be compensated in damages? . . . Compensation for the diminished enjoyment or use of the property for a certain number of years is not compensation for the diminished value of the estate itself. The profit of the land must not be confounded with the land itself. If the land were under lease an injury which diminished its annual profit to the tenant and also [405] depreciated and diminished the value of the property itself would be the subject of a double action in which the tenant and the landlord would each recover the amount of his own loss. Of course, when the owner claims in both cases he cannot be allowed double compensation for the same loss. So that the damages for use must not represent in any part the damages for the permanent injury. It is the duty of the court to see that one does not overlap the other.[1] We think the court erred in refusing to admit both methods of computing the permanent damages, to wit: that which measures the damages by the different values of the land with and without the deposit, and that which measures them by the cost of removing the deposit. It is often difficult for the court to determine the true measure until the evidence is in; it may turn out that the cost of removing the deposit in a certain case would be less than the difference in the value of the land, and then the cost of removal would be the proper measure of damages; or it may be that the cost of removal would be much greater than the injury by the deposit, when the true measure would be the difference in value merely." A similar ruling has been made in New York. The owner of a flax mill upon a natural stream permitted flax shives to float down the current and collect in a mass or deposit in a mill-pond below, thereby impairing the use of the mill. The cost of removing the deposit was held to be a direct consequence of the injury, and was

[1] San Antonio v. Estate of Mackey, 22 Tex. Civ. App. 145, 54 S. W. Rep. 33, citing the text.

recoverable although it had not been removed. The removal being necessary to restore the property to its former condition, the expense of it would measure the diminution of value by the wrong done. But this was not deemed to be exclusive of other elements of damage, as, for example, the effect of the shives upon cattle in drinking and the filling in at high water of the trunks leading from the pond to the mill.[1]

§ **1043. Same subject.** In New Hampshire it has been laid down that wherever the nuisance is such that its continuance is necessarily an injury, and is of a character that will continue without change from any cause but human labor, the measure of damages is an equivalent for the original and [406] entire injury, and it may at once be fully compensated, since the injured person has no means of compelling the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only accomplish that, if at all, by the expenditure of his own means.[2] This comprehensive remedy

[1] O'Riley v. McChesney, 3 Lans. 278, affirmed, 49 N. Y. 672.

[2] The case and the application of the principle thereto were thus stated by the court: "The town is made by law chargeable with the duty and expense of maintaining the road which this railroad company have in part destroyed and in part obstructed, according to the declaration; they have a qualified interest in the roadway and bridge which they have constructed and have the right to maintain, and in the materials of which they are composed, and are entitled to recover the value of that roadway and material. The railroad is in its nature and design and use a permanent structure which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad is, therefore, a permanent appropriation; the use of the land set apart to be used as a highway by the railroad company for the use of their track is a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain the highway. The injury done to the town is then a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages. Those damages are, first, the value to them of the property and rights of which they have been deprived, for the use and purpose to which they are by law bound to apply them. Assuming, then, that they were sufficient to meet the requirements of the law and the public wants for a highway, their value is to be measured by the cost of the new ground they are bound to furnish to the community for a way, if it will be less costly and more reasonable, having reference to the accommodation of the public by the highway and the railway to procure new ground, rather than to build a highway over or

for the damage from a permanent nuisance is adopted in Iowa. "In the light of it," said the court, "we can see that in a case of overflow from a mill-dam the injured party should be allowed to maintain successive suits. Somewhat depends on the way the dam is used. The injury, therefore, is not uniform. But what is of controlling importance, the dam if not maintained will go down, as surely as the sun will go down, and the nuisance of itself will come to an end. Its duration will be determined by freshets and other forces which are contingent, and, therefore, incalculable. It may, indeed, be so built that it should be regarded as permanent. In such case it is said that the damage should be considered and treated as original.[1] While no infallible test can be applied to enable us to determine whether a structure is permanent or not, inasmuch as nothing is absolutely permanent, yet when a structure is practically determined to be a permanent one, its permanency,

under the railway; by the cost of the materials which will be requisite to make a road, which will as well meet the requirements of the legal duty of the town to the public in relation to the road as the old, and the expense of applying those materials to that use in the new road, and the fund that will be permanently required in all future time to defray the increased expense of supporting and maintaining the new road in suitable repair beyond what would have been necessary for the old road. These ingredients go to make up the present value of the old road of which the town has been deprived, and they are to be recovered, not as prospective damages, but as a compensation for the injury the town has now sustained. When these expenses shall be paid by the town, or whether they shall ever be paid, is a question with which these defendants have nothing to do. If, from change of circumstances, the town should be relieved from the burden of maintaining the road, the amount paid by the railroad will be applied, as in equity it should, to replace to the town the cost of the land for the road and the expense of making it, long since paid by them." Troy v. Cheshire R. Co., 23 N. H. 102.

Referring to the test laid down by the New Hampshire court the Tennessee court pronounces it artificial and arbitrary. "There are supposable instances which, by the effect of time, might at last abate themselves, but by far the greater number of trespasses, wrongs and nuisances would continue indefinitely without the expenditure of human labor to remove or abate them. It is a rule which does not commend itself by either its reasonableness, its certainty of application or its justice." Nashville v. Comar, 88 Tenn. 415, 420, 12 S. W. Rep. 1027; Daniel v. Ft. Worth, etc. R. Co., 69 S. W. Rep. 198 (Tex. Ct. of Civ. App.), citing the text. Uline v. New York, etc. R. Co., 101 N. Y. 98, 4 N. E. Rep. 536, 54 Am. Rep. 661, is a very interesting and important case on this subject, and is in accord with the Tennessee case.

[1] Citing Troy v. Cheshire R. Co., *supra*.

if it is a nuisance and will necessarily result in damages, will make the damages original."[1] The case was this: The [408] defendant had constructed a ditch along a street by the plaintiff's property in such a negligent and unskilful manner that it was injured thereby; one ditch was made to empty into another by a fall, making a cavity below the fall and wearing away the land at its brink. The court held that the damage resulting from the construction of the ditch was original damage. It was said: "After the ditch was constructed and the water of the creek first began to work upon the plaintiff's land, its continuance was just as certain as that water would flow in the creek unless changes were made therein by human hands. Its continuance would just as certainly be an injury as that the floods of the creek would wash the soil and earth through which the ditch was dug. It follows then that the plaintiff's cause of action accrued for all injury sustained or that in the future would be suffered." Also: "We have seen no case where successive actions have been allowed for damages resulting from negligence combined with a natural cause, however gradual the operation of that cause. Successive actions are allowed only when the defendant is in continuous fault. It may be a fault of commission or omission, but if the latter, it must be something else than an omission to repair or arrest an injury resulting from negligence or unskilfulness, unless the remedy is to be applied upon the wrong-doer's premises."[2]

The rule stated, as applied to such a case, affords the defendant no option or opportunity to put an end to the injury by amending his work; but the permanent or "original damages" are reducible to the amount it would cost the plaintiff himself to amend it if the injurious feature of it may be corrected at a moderate expense.[3] A subsequent case occurred which was unaffected by this mitigation. A railroad company and a city were the defendants. The latter had, in the exercise of its

[1] Powers v. Council Bluffs, 45 Iowa, 655, 24 Am. Rep. 792; Bizer v. Ottumwa Hydraulic Power Co., 70 Iowa, 145, 30 N. W. Rep. 172.

The same rule has been applied where a railroad had insufficient culverts. Van Orsdol v. B., C. R. & N. R. Co., 56 Iowa, 470, 9 N. W. Rep. 379.

[2] See Finley v. Hershey, 41 Iowa, 389.

[3] Simpson v. Keokuk, 34 Iowa, 568; Van Pelt v. Davenport, 42 id. 314.

powers, granted the company the right to locate its road along a street, adjacent to which the plaintiff owned and occupied property. The complaint was that there was negligence in selecting a line for the road on that street, and it was fixed unnecessarily near the plaintiff's premises, thereby causing him [409] great inconvenience and damage. The true measure of damages was held to be the difference in value of the plaintiff's property with the road constructed upon its present line in the street and what that value would have been if the road had been constructed upon a line therein selected with reasonable care and a proper regard for the rights of all interested.[1] In another case the plaintiff was the owner of a lot abutting on a slough or arm of the Mississippi river, and occupied it with a slaughter or pork-house; the defendant owned a saw-mill on the same slough, and partially filled up this slough in front of his premises and thereby impeded and cut off the flow of water from the river. The wrong was treated as an entirety, and the damages were measured and ascertained by comparison of the value of the property affected by the filling up of the slough, prior thereto, and its value as depreciated by such filling. It was insisted that the true measure was the difference between the value of the use of the property before and after the filling. On this point the court said: "The injury sustained by plaintiffs affected the property itself and incidentally the value of its use was depreciated. It is evident that the rule contended for by defendant's counsel would, if applied to the case, fail to make full compensation to plaintiffs. The property depreciated in value because the value of its use was affected and because the property itself was injured by the acts complained of. In order to compensate the plaintiffs for the injury to their property they should recover to the extent its value was depreciated. If plaintiffs could only recover for the depreciated value of the use of the property whenever the property was used, as defendant claims, there would be a continually recurring cause of action in favor of plaintiffs and the rights of the parties would not be settled in the present suit, a thing which the law will avoid."[2]

[1] Cadle v. Muscatine, etc. R. Co., 44 Iowa, 11; O'Connor v. St. Louis, etc. R. Co., 56 id. 735, 10 N. W. Rep. 263.

[2] Finley v. Hershey, 41 Iowa, 389.

§ 1044. Same subject. In a late Massachusetts case[1] a railroad company, for the construction of its road-bed in such a manner as unnecessarily to turn the current of a stream against the plaintiff's land and wash away his soil, was held liable for prospective as well as past injury. A recovery of [410] prospective damages in a prior suit was held to bar an action for subsequent damage, though caused by an unusual freshet. The declaration in the former suit was for soil washed away and for diminution in the value of the residue. In a later case a railroad company built a culvert under its road-bed, and unnecessarily brought together eight streams of water which were discharged through the culvert upon adjoining land at a place different from the original course of any of them. Thereafter these combined waters, and also an increased flow of surface water caused by the road-bed, continued to flow through the culvert. Some seven years after the road-bed was made, as the result of heavy rains, the land of the plaintiff was overflowed and his crop injured. It was determined that the rail-

[1] Fowle v. New Haven & N. Co., 112 Mass. 334, 17 Am. Rep. 106. The court say: "The permanent character of the structure, and the fact that the plaintiff accepted damages which were assessed for the permanent injury, and necessarily involved a consideration of the probable future effect upon the plaintiff's land of the changed current of such a stream in its different stages of water, remain unaffected by the evidence. The jury may have intended to compensate the plaintiff for the injury now complained of, or to give him the means to protect himself against it. As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable, because every continuance of a nuisance is a new injury and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to the past and probable future injury. This is the course which appears to have been taken in this case, and to allow a recovery here might subject the defendant to double damages." See Wells v. New Haven & N. Co., 151 Mass. 46, 23 N. E. Rep. 724, 21 Am. St. 423; Aldworth v. Lynn, 153 Mass. 53, 26 N. E. Rep. 229, 25 Am. St. 608, 10 L. R. A. 210; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. Rep. 821.

road structure was a continuing nuisance, that the plaintiff, who bought the land shortly before the damage was done, could maintain an action for the damage occurring after his purchase, and that the statute of limitations was no bar. Referring to the case cited, it was said that in some respects it resembled that before the court; that the plaintiff had brought a former action in which he expressly declared for prospective damages, and he was allowed to recover them, apparently without any objection on this ground from the defendant; and if he had been allowed to hold his second verdict he would have got double damages, which clearly was not permissible. The decision of that case does not necessarily imply that an action must have been brought within six years, or, if it does, we cannot follow it; and we have no occasion to consider whether ordinarily prospective damages would be recoverable in such a case or not.[1] In Kentucky there may be a recovery for past and prospective injury from a permanent nuisance; as for a railroad laid and operated in a street of a city, impairing the value of the easement therein of adjacent lot-owners and subjecting such owners occupying their lots to daily annoyance from smoke, soot, noise and hazard of fire.[2] In a subsequent case it was held that if the railway tracks have been so located as to unreasonably obstruct the abutting lot-owner's means of ingress and egress over the street to and from his lot; or if his

[1] Wells v. New Haven & N. Co., *supra*.

[2] Elizabethtown, etc. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67. The injury and damage are thus stated by the court: "We adjudge [411] that if appellant's road has been so located as to deprive appellee of the means of ingress and egress to and from his lot on W. street with ordinary vehicles on either side of its road when its trains are passing or standing on the street in front of his lot, he is entitled to recover such damages as he has thereby sustained; and if his houses are damaged by having smoke, soot or fire from passing engines thrown or blown into or against them, he is entitled to recover for this also. The diminution of the value of the adjacent property occasioned by these circumstances will be the measure of his right to recover. We have heretofore held in actions for injury to real estate by trespassers that the plaintiff can only recover compensation for the injury done up to the commencement of the action; but that was in cases of injury not continuing or permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of."

houses have been injured by having smoke, sparks or cinders thrown or blown into or upon them; or if their walls have been cracked by the rapid movement of heavy trains of cars, he is entitled to recover for the damages directly resulting from all or any one or more of these causes; that the measure of damages which the lot-owner may recover, if entitled to recover at all, is the diminution in value of his houses and lot by the location of the railway tracks, and the uses to which they are authorized to be put by the grant under which they are built. If the location and operation of the roads in front of the houses diminish their value, say twenty per centum, then the diminution should be proportioned to their value just preceding the time at which it became generally known that the street had been selected as the line of the road. The jury should ascertain what the value of the property was just before it became generally known that the road was to be [412] located in front of it, and then determine what proportion of that value was taken from the houses and lot by the obstruction of the street and the annoyance incident to the movement of engines and trains of cars along and over the road. Benefits arising out of or from an unauthorized act may sometimes be considered in the determination of the sum to be recovered by the injured party; but in all cases these benefits must be direct and immediate. They must be confined to the approximate consequences of the act complained of, and be of like kind with the opposite injuries for which the recovery is sought. If the railway afford the complaining lot-owner increased or additional facilities for ingress or egress to and from his houses and lot, or for the movement of articles in which he may deal, or supplies which it is necessary that he shall procure, this benefit may be taken into consideration in estimating the damages he has sustained. The same case announced the doctrine that by instituting an action for permanent damages the lot-owner in effect consents that the railroad company may continue for all future time to use the street as it is now using it, and, as consideration therefor, to accept such judgment as may be therein rendered.[1]

[1] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667.

In Kemper v. Louisville, 14 Bush, 87, the defendant was a municipal corporation; by a street improvement it dammed a natural drain, and

§ 1045. Same subject. In Illinois the doctrine has been carried still further. In an action by the owner and occupant of a lot situated near the right of way of a railroad on which the company erected cattle pens, so conducted as to become a nuisance, the court held that in estimating the damages it was proper to consider the depreciation in the value of the plaintiff's property occasioned by such nuisance, and in addition the injury and annoyance to him while occupying the premises; that one recovery for such depreciation would bar any future action for the same cause; but if the former recovery [413] was for annoyance merely and for rendering the atmosphere unwholesome, then a similar recovery might be had at every term of court so long as the nuisance continues.[1] In a recent case in one of the Illinois appellate courts this test is suggested as proper for the determination of the question as to the permanence of a nuisance: Where a permanent structure is lawfully erected and thereby an injury is occasioned to adjoining property, if the structure is properly built with reference to its use and so as to produce no unnecessary damage, the cause of action arising from an injury caused by it is an entirety; but if the injury complained of results from an improper construction it is otherwise.[2] The supreme court, however, does not approve of this rule as applied to erections on private land, as where the wrong done consists in causing water to flow from a building on the land of the owner to the land of another.[3] In Arkansas the contrary rule is favored.[4] In North Carolina the damages resulting from the failure to provide a railroad with space enough between its embankments or with culverts sufficient to carry off any water

thus flooded the plaintiffs' lot where he lived. It was held that the plaintiffs were entitled to recover for the injury to their house and lot, and that while no recovery could be had for physician's bills, or loss of time to the occupants, on account of sickness caused by the stagnant water, still these facts might be proved with a view to show the extent to which the value of the property had been lessened by reason of the act complained of.

[1] Illinois, etc. R. Co. v. Grabill, 50 Ill. 241; Chicago, etc. R. Co. v. Baker, 73 Ill. 316; Cleveland, etc. R. Co. v. Pattison, 67 Ill. App. 351; Sanitary District v. Ray, 85 id. 115.

[2] Chicago, etc. R. Co. v. Schaffer, 26 Ill. App. 280.

[3] Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. Rep. 693, 47 Alb. L. J. 28, 34 Am. St. 92.

[4] Railway Co. v. Cook, 57 Ark. 387, 21 S. W. Rep. 1066.

that might be reasonably expected to accumulate is such a wrong that the party sustaining injury thereby may recover therefor, in one action, present and prospective damages.[1]

In a case in the Ontario court of appeals a railroad company diverted a stream of water from the land of the plaintiff, which could, with slight expenditure, have been restored to its natural flow. It was contended that the damages should not be fixed as for a permanent obstruction. The opinion intimates that if the award had been extremely large that view might have been acceded to, but because it was not it was considered that there was no injustice to the defendant in allowing the verdict to stand, especially as it brought the litigation upon itself by disregarding the plaintiff's requests for a settlement. It was said: In cases of this kind, where the plaintiff is clearly entitled to relief in one form or the other, and where the defendant has not pointedly and conclusively shown him to be wrong in the forum of his selection, there is authority for holding that the whole damage may be assessed once for all, and that the plaintiff will not be confined merely to damages down to the trial, leaving future damages as for a continuing injury to be recovered in a subsequent proceeding.[2]

§ 1046. Same subject; result of the cases. The apparent discrepancy in the American cases on this subject may, perhaps, be reduced by supposing that where the nuisance consists of a structure of a permanent nature and intended by the defendant to be so, or of a use or invasion of the plaintiff's property, or a deprivation of some benefit appurtenant to it for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury and recover damages for the whole time, estimating its duration according to the defendant's purpose in creating or continuing it; or to treat it as a temporary wrong to be compensated for while it continues, that is, until the act complained of becomes rightful by grant, condemnation of property or ceases by abatement. The recovery of damages on a declaration alleging the permanency of the nuisance, on principle, would estop

[1] Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. Rep. 730, 32 L. R. A. 708.

[2] Arthur v. Grand Trunk R. Co., 22 Ont. App. 89, citing Parkdale v. West, 12 id. 602; North Shore R. Co. v. Pion, 14 id. 612.

the plaintiff not only from recovering future damages, but also from taking any steps to abate the nuisance during the period for which damages had been recovered. This is apparently the law in Kentucky, Illinois, Indiana, Missouri, Ohio and Georgia. By such an action the plaintiff consents to the continuance, according to his allegations, of the duration of the injury for which he recovered judgment, and accepts the recovery as a compensation therefor.[1] In North Carolina it is said to be the right of the plaintiff in an action against a railroad company whose road was built under public authority, or of the defendant, to elect to have permanent damages assessed upon demand made in the pleadings, and that when either makes the demand the judgment may be pleaded in bar of any subsequent action. The defendant must set up this or any other equity upon which he relies. But where the plaintiff is allowed without objection to have such damages apportioned the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed, and upon proof of a previous partial assessment the jury may consider that fact in diminution of the permanent damage.[2] In the Massachusetts case which has been referred to the plaintiff's second action was deemed barred on account of the scope of his first declaration and the acceptance of damages assessed for the permanent injury.[3] Thus considered, such a recovery will have the effect to give the defendant a permanent right to do

[1] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667; Chicago, etc. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. Rep. 460; Wenona Zinc Co. v. Dunham, 56 Ill. App. 351; Cleveland, etc. R. Co. v. King, 23 Ind. App. 573, 55 N. E. Rep. 875; Scott v. Nevada, 56 Mo. App. 189; Wolf v. Cincinnati Edison El. Co., 6 Ohio Dec. 159; Clark v. Lanier, 104 Ga. 184, 30 S. E. Rep. 741.

[2] Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 1009, 24 S. E. Rep. 730, 32 L. R. A. 708.

[3] Fowle v. New Haven & N. Co., 112 Mass. 338, 17 Am. Rep. 106. See § 1044.

In Johnson v. Porter, 42 Conn. 234, the plaintiff alleged in his declaration that the defendant had annoyed him by offensive odors from a barnyard, placed by the latter near the plaintiff's dwelling-house, and that thereby he was prevented from the comfortable use of his house; and his family was made sick, and he was subjected to medical expense. It was held that he could not under this declaration, for the purpose of enhancing damages, show the diminished value of his dwelling-house and lot by reason of the offensive odors. See Illinois, etc. R. Co. v. Grabill, 50 Ill. 241.

the acts which constitute the nuisance as fully as though [414] there had been a condemnation of the property by the exercise of the power of eminent domain. But the option to recover permanent damages in a common-law action, with this effect, is not generally admitted in this country and is wholly unknown in England.[1] We agree with the Tennessee court that "the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong when the cause of the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that where the cause of the injury is one not presumed to continue that the damages recoverable from the wrong-doer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance."[2]

§ 1047. Depreciation in value as damages. If permanent damages are allowed they are measured by the depreciation of value caused by the nuisance, or by adding to the damages allowed for past injury the amount necessary to restore the premises to their former condition, or to protect the plaintiff against future injury,[3] the computation to be based on the

[1] Nashville v. Comar, 88 Tenn. 415, 12 S. W. Rep. 1027, 7 L. R. A. 465; Harmon v. Railroad, 87 Tenn. 614, 11 S. W. Rep. 703; Uline v. New York, etc. R. Co., 101 N. Y. 98, 4 N. E. Rep. 536, 54 Am. Rep. 661; Adams v. Hastings, etc. R. Co., 18 Minn. 260; Hartz v. St. Paul, etc. R. Co., 21 id. 358; Brewster v. Sussex R. Co., 40 N. J. L. 57; Ford v. Chicago, etc. R. Co., 14 Wis. 609; Harrington v. St. Paul, etc. R. Co., 17 Minn. 215; Blesch v. Chicago, etc. R. Co., 43 Wis. 183; Ellsworth v. Central R. Co., 34 N. J. L. 93; Carl v. Sheboygan, etc. R. Co., 46 Wis. 625, 1 N. W. Rep. 295; Atlantic, etc. R. Co. v. Robbins, 35 Ohio St. 531; Battishill v. Reed, 18 C. B. 696; Devery v. Grand Canal Co., 9 Irish C. L. 194; Mellor v. Pilgrim, 3 Ill. App. 476. See Denver v. Bayer, 7 Colo. 113, 2 Pac. Rep. 6.

[2] Nashville v. Comar, *supra;* Chattanooga v. Dowling, 101 Tenn. 342, 47 S. W. Rep. 700.

[3] Finley v. Hershey, 41 Iowa, 389; Illinois, etc. R. Co. v. Grabill, 50 Ill. 241; Chicago, etc. R. Co. v. Baker, 73 Ill. 316; Powers v. Council Bluffs, 45 Iowa, 655, 24 Am. Rep. 792; Elizabethtown, etc. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67; Fowle v. New Haven & N. Co., 112 Mass 338, 17 Am. Rep. 106; O'Riley v. McChesney, 3 Lans. 278; Bare v. Hoffman, 79 Pa. 71, 21 Am. Rep. 42; Givens v. Van Studdiford, 4 Mo. App. 498; Chicago, etc. R. Co. v. Carey, 90 Ill. 514; Drake v. Chicago, etc. R. Co., 63 Iowa, 302, 19 N. W. Rep. 215, 50 Am. Rep. 746; Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. Rep. 172; Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. Rep. 376; Chouteau v. St. Louis, 8 Mo. App. 48; Auten-

value of the property at the time the cause of the nuisance began.[1] This measure of recovery, it is said in a Texas case, comprehends the entire injury for which the defendant is liable.[2] If the cost of restoring property is less than its value there may be a recovery of the actual loss of rentals in addition to such cost,[3] and for the future.[4] Where, however, the damages are assessed for the continuance of the nuisance to

rieth v. St. Louis, etc. R. Co., 36 id. 254; Trinity & S. R. Co. v. Schofield, 72 Tex. 496, 10 S. W. Rep. 575; Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. Rep. 167; Ordway v. Canisteo, 66 Hun, 569, 21 N. Y. Supp. 835; In re Thompson, 85 Hun, 438, 32 N. Y. Supp. 897; Van Siclen v. New York, 32 N. Y. Misc. 403, 66 N. Y. Supp. 555; Hare v. Pittsburg, etc. R. Co., 10 Pa. Super. Ct. 647; Williams v. Fulmer, 151 Pa. 405, 25 Atl. Rep. 103, 31 Am. St. 767; Harris v. Philadelphia, 155 Pa. 76, 26 Atl. Rep. 874; Gentry v. Richmond, etc. R. Co., 38 S. C. 284, 16 S. E. Rep. 893; Paris v. Allred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62; Hall v. Austin, 20 Tex. Civ. App. 59, 65, 48 S. W. Rep. 53; Nading v. Denison, 22 Tex. Civ. App. 173, 54 S. W. Rep. 412; Wallace v. Kansas City & S. R. Co., 47 Mo. App. 491; Farley v. Gate City Gas Light Co., 105 Ga. 323, 330, 31 S. E. Rep. 193; St. Louis, etc. R. Co. v. Anderson, 62 Ark. 360, 35 S. W. Rep. 791; Mayor v. Sikes, 94 Ga. 30, 20 S. E. Rep. 257, 47 Am. St. 132; Farkas v. Towns, 103 Ga. 150, 29 S. E. Rep. 700, 68 Am. St. 88; Lake Erie & W. R. Co. v. Purcell, 75 Ill. App. 573; Louisville, etc. R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. Rep. 546; Martin v. Chicago, etc. R. Co., 47 Mo. App. 452; Maysville v. Stanton, 12 Ky. L. Rep. 586, 14 S. W. Rep. 675; St. Louis Trust Co. v. Bambrick, 149 Mo. 560, 51 S. W. Rep. 706; Dammann v. St. Louis, 152 Mo. 186, 53 S. W. Rep. 932; Toledo v. Grasser, 12 Ohio Ct. Ct. 520 (disapproving the cost of repairs as the measure of damages); Sterling Hydraulic Co. v. Galt, 81 Ill. App. 600; Chesapeake & O. R. Co. v. Gross, 19 Ky. L. Rep. 1926, 43 S. W. Rep. 203; Parker v. Norfolk & C. R. Co., 119 N. C. 677, 25 S. E. Rep. 722; Daniel v. Ft. Worth, etc. R. Co., 69 S. W. Rep. 198 (Tex. Ct. of Civ. App.); Coleman v. Bennett, — Tenn. —, 69 S. W. Rep. 734; Chicago North Shore Street R. Co. v. Payne, 192 Ill. 239, 61 N. E. Rep. 467; Bungenstock v. Nishnabotna Drainage District, 163 Mo. 198, 64 S. W. Rep. 149.

This measure of damages was approved where only temporary damages were recovered. Threatt v. Brewer Mining Co., 49 S. C. 95, 134, 26 S. E. Rep. 970.

Where water was diverted from a mill-site by means of a permanent ditch, the plaintiff was entitled, at his election, to recover the difference in the value of the land without the diverted water and its value with that water, or the like difference as to the value of the mill-site itself. Southern Marble Co. v. Darnell, 94 Ga. 231, 21 S. E. Rep. 531.

[1] Missouri, etc. R. Co. v. Graham, 12 Tex. Civ. App. 54, 33 S. W. Rep. 576.

[2] Daniel v. Ft. Worth, etc. R. Co., 69 S. W. Rep. 198 (Tex. Ct. of Civ. App.).

[3] Harvey v. Susquehanna Coal Co., 201 Pa. 63, 50 Atl. Rep. 770, 88 Pa. 800; Helbling v. Allegheny Cemetery Co., 201 Pa. 171, 50 Atl. Rep. 970.

[4] Mineral Wells v. Russell, 70 S. W. Rep. 453 (Tex. Ct. of Civ. App.).

the commencement of the suit only it may affect and injure the inheritance as well as the value of the possession; they may, therefore, be assessed for any permanent injury so caused and for the depreciation of rental value; by the difference, in other words, between the rental value free from the effects of the nuisance and subject to it; but to the occupant the latter damages may be computed on the diminution of the value of the use to him.[1] The rule of liability based upon depreciation

[1] Francis v. Schoellkopf, 53 N. Y. 152; Wiel v. Stewart, 19 Hun, 272; Whitmore v. Bischoff, 5 id. 176; Emery v. Lowell, 109 Mass. 197; Walrath v. Redfield, 11 Barb. 368; Hatfield v. Central R. Co., 33 N. J. L. 251; Carl v. Sheboygan, etc. R. Co., 46 Wis. 625, 1 N. W. Rep. 295; Bare v. Hoffman, 79 Pa. 71, 21 Am. Rep. 42; Chicago v. Huenerbein, 85 Ill. 594, 28 Am. Rep. 626; Schuylkill Navigation Co. v. Farr, 4 W. & S. 362; Gile v. Stevens, 13 Gray, 146; Jutte v. Hughes, 67 N. Y. 267; Pinney v. Berry, 61 Mo. 359; Eufaula v. Simmons, 86 Ala. 515, 6 So. Rep. 47; Jackson v. Kiel, 13 Colo. 378, 22 Pac. Rep. 504, 16 Am. St. 207; Georgia R. & B. Co. v. Berry, 78 Ga. 744, 4 S. E. Rep. 10; Sullens v. Chicago, etc. R. Co., 74 Iowa, 659, 38 N. W. Rep. 545, 7 Am. St. 501; Shirely v. Cedar Rapids, etc. R. Co., 74 Iowa, 169, 37 N. W. Rep. 133, 7 Am. St. 471; Hussner v. Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. Rep. 1002, 11 Am. St. 679; Schwab v. Cleveland, 28 Hun, 458; Pond v. Metropolitan E. R. Co., 42 Hun, 567; Harmon v. Railroad, 87 Tenn. 614, 11 S. W. Rep. 703; Gulf, etc. R. v. Helsley, 62 Tex. 593; Same v. Tait, 63 id. 223; Sabine, etc. R. Co. v. Johnson, 65 id. 389; Same v. Brousard, 69 id. 617, 7 S. W. Rep. 374; Comminge v. Stevenson, 76 Tex. 642, 13 S. W. Rep. 556; Willey v. Hunter, 47 Vt. 479; Langfelt v. McGrath, 33 Ill. App. 158; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. Rep. 813; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. Rep. 427; Van Bruen v. Fishkill Water-works Co., 50 Hun, 448, 3 N. Y. Supp. 336; Bennett v. Marion, — Iowa, —, 93 N. W. Rep. 558; Mitchell v. West, — Iowa, —, 93 N. W. Rep. 380; Swift v. Broyles, 115 Ga. 885, 42 S. E. Rep. 277; Hollenbeck v. Marion, 116 Iowa, 69, 89 N. W. Rep. 210; Reisert v. City of New York, 69 App. Div. 302, 74 N. Y. Supp. 673; Keithsburg v. Simpson, 70 Ill. App. 467; Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233, 46 N. E. Rep. 591; Podhaisky v. Cedar Rapids, 106 Iowa, 543, 76 N. W. Rep. 847; Louisville v. McGill, 21 Ky. L. Rep. 718, 52 S. W. Rep. 1053; Louisville v. O'Malley, 21 Ky. L. Rep. 873, 53 S. W. Rep. 287; Jungblum v. Minneapolis, etc. R. Co., 70 Minn. 153, 72 N. W. Rep. 971; Gillett v. Kinderhook, 77 Hun, 604, 28 N. Y. Supp. 1044; Fischer v. Sandford, 12 Pa. Super. Ct. 435; Railway Co. v. Cook, 57 Ark. 387, 397, 21 S. W. Rep. 1066, citing the text; Ivie v. McMunigal, 66 Mo. App. 437; Macon v. Dannenberg, 113 Ga. 1111, 39 S. E. Rep. 446; Hoffman v. Flint, etc. R. Co., 114 Mich. 316, 72 N. W. Rep. 167; Adams v. Durham & N. R. Co., 110 N. C. 325, 14 S. E. Rep. 857.

The owner of a hotel cannot recover, in addition to the loss of rental value, for a reduction of rent made because of the nuisance, nor for rent which he voluntarily remitted in order that the tenant might take a new lease, nor for his personal an-

in rental value may be applied as well where the owner occupies the affected premises as where they are rented or offered for rent,[1] or are not occupied at all.[2] In New York if the owner occupies the premises he is entitled to recover for their lessened usable value.[3] It has been said of the distinction between these rules for measuring damages that so far as usable value includes something other than rental value, it must necessarily refer to the net results to be obtained by the owner from the property in any legitimate use to which it could be put. Usable value must be shown by testimony of the facts from which the jury may find such value; it cannot be shown by the conclusion of a witness.[4]

Where the action is brought by the owner alone there cannot be a recovery, in addition to such depreciation and the cost of repairs and protection from further injury, for depreciation in value unless permanent damages are recovered.[5] Where the action is brought to recover for past injuries and the measure of liability depends upon the rental or usable value of the property affected, the estimate must be made upon the basis of

noyance on account of the nuisance, he having chosen to board in the hotel. Miller v. Edison Electric Illuminating Co., 33 N. Y. Misc. 664, 68 N. Y. Supp. 900.

In Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 145, a mortgagee who had taken possession was held entitled to recover interest on the value of a mill privilege rendered useless for the erection of a mill by a dam built below.

[1] Michel v. Supervisors, 39 Hun, 47; Brown v. Woodliff, 89 Ga. 413, 15 S. E. Rep. 491; Francis v. Schoellkopf, 53 N. Y. 152; Rosenheimer v. Standard Gas Light Co., 36 App. Div. 1, 10, 55 N. Y. Supp. 192; Harris v. Philadelphia, 155 Pa. 76, 26 Atl. Rep. 874; Swift v. Broyles, 115 Ga. 885, 42 S. E. Rep. 277. *Contra*, Potter v. Froment, 47 Cal. 165.

A life tenant may recover the entire rental value of premises rendered untenantable notwithstanding he occupied them rather than remove from them. Herbert v. Rainey, 162 Pa. 525, 29 Atl. Rep. 725.

But in Illinois it is ruled that the damages must be measured by the discomforts and the deprivation of the healthful use and comforts of the plaintiff's home, and not by depreciation in its rental value. Fairbank Co. v. Nicolai, 167 Ill. 242, 47 N. E. Rep. 360; Cleveland, etc. R. Co. v. Pattison, 67 Ill. App. 351; Chicago-Virden Coal Co. v. Wilson, 67 Ill. App. 443; Litchfield v. Whitenack, 78 Ill. App. 364.

[2] Pettit v. Grand Junction, — Iowa, —, 93 N. W. Rep. 381.

[3] Tallman v. Metropolitan E. R. Co., 121 N. Y. 119, 23 N. E. Rep. 1134, 8 L. R. A. 173; Woolsey v. New York E. R. Co., 134 N. Y. 323, 30 N. E. Rep. 387, 31 id. 891.

[4] Randall v. United States Leather Co., 72 App. Div. 317, 76 N. Y. Supp. 82.

[5] Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. Rep. 365.

the value of the property in the condition it was during the time it was affected; damages cannot be recovered upon the basis of its value for uses to which it might have been, but was not, put.[1] If the property injured is not devoted to any use the test is the value of its use when occupied for any purpose for which it is suitable in its then condition.[2] The diminution of the value of the land is the measure of recovery where the plaintiff is executor and has held possession of the land affected since the death of the testator.[3] Damages may be recovered in the same action for injury of a temporary character and for that which is permanent.[4] It is probable that if any circumstances of aggravation exist or there is great difficulty in proving the damage that the plaintiff will not be required to produce the most convincing proof as to its amount.[5]

§ 1048. Other elements of damages. The measure of damages thus stated compensates the ordinary or gen- [415] eral loss from the nuisance. If there are special elements of damage, as in most cases there are, the recovery may be increased accordingly.[6] If the injury done makes repairs neces-

[1] Tallman v. Metropolitan E. R. Co., 121 N. Y. 119, 23 N. E. Rep. 1134, 8 L. R. A. 173; Hatfield v. Central R. Co., 33 N. J. L. 251; Dorlan v. East Brandywine & W. R. Co., 46 Pa. 520; Potter v. Indiana, etc. R. Co., 95 Mich. 389, 54 N. W. Rep. 956; Southern Marble Co. v. Darnell, 94 Ga. 231, 21 S. E. Rep. 531.

[2] Pettit v. Grand Junction, — Iowa, —, 93 N. W. Rep. 381.

These cases may be distinguishable from an English case brought to recover for the obstruction of ancient lights. In such an action the damages are not to be assessed solely with reference to the effect the diminished light has for the purposes of occupation or business to which the premises have been or were put at the time of the obstruction; the uses to which they might thereafter be put are to be considered. Moore v. Hall, 3 Q. B. Div. 178, disapproving Martin v. Goble, 1 Camp. 320.

[3] Drake v. Lady Ensley Coal, Iron & R. Co., 102 Ala. 501, 14 So. Rep. 749, 24 L. R. A. 64.

[4] Wallace v. Kansas City, etc. R. Co. 47 Mo. App. 491, 498, citing Babb v. Curators of State University, 40 Mo. App. 173; Givens v. Van Studdiford, 4 Mo. App. 938, 86 Mo. 149, 56 Am. Rep. 421, and this section.

[5] In Tuebner v. California Street R. Co., 66 Cal. 171, 4 Pac. Rep. 1162, there was a verdict for $1,000. In answer to the contention that the amount was excessive the court said: "It was not incumbent on the plaintiffs to prove their injury by value; it may have been of trivial cost to sweep up a pail of soot, and yet the soot may have caused serious injury; it may also have been quite out of the question to prove the loss in value sustained by the jarring. It was for the jury to determine a reasonable sum to be proper compensation."

[6] Where a mining company which used the chlorinating process per-

sary their expense may be recovered as well as the rent which would have been received from the property if it was occupied during the time they were being made.[1] The owner is not entitled to recover, in addition, for a depreciation of rental value because of a prejudice which exists against his property in consequence of the nuisance. That is not damage which is the natural result of, or caused by, the injury.[2] Where land temporarily injured or permanently destroyed is so connected with other land that the value of the latter is permanently impaired the extent of such impairment is an element of damage.[3] Where the defendant caused the nuisance by digging a ditch, and by means thereof conducted water from his brewery into a clay pit on the plaintiff's premises, and such water became stagnant and offensive, and plaintiff incurred expense in filling up the pit by direction of the board of health, the expense so incurred was allowed as an item of damage.[4] The owner and occupier may recover for expenses incurred to protect the premises affected by the nuisance against a continuance of the injury as well as to repair that already done.[5] The owner of the reversion may also recover

mitted its *detritus* and tailings to run down a stream on the lands of the lower owner, the damages were said to be made up of these elements: the injury to the land, to the right to water the stock, to the air, to the fishing privilege, to the plaintiff's ditches, and to two public roads, if he sustained special damage as to the latter. Threatt v. Brewer Mining Co., 49 S. C. 95, 128, 26 S. E. Rep. 970.

[1] Rust v. Victoria Graving Dock Co., 36 Ch. Div. 113, 131; Graves v. Kansas City, etc. R. Co., 69 Mo. App. 574; Slavin v. State, 152 N. Y. 45, 46 N. E. Rep. 321; Connor v. State, 152 N. Y. 49, 46 N. E. Rep. 1145; Weir v. Plymouth, 148 Pa. 566, 24 Atl. Rep. 94; Herbert v. Rainey, 162 Pa. 525, 29 Atl. Rep. 725; Nashville v. Sutherland, 94 Tenn. 356, 369, 29 S. W. Rep. 298; San Antonio v. Estate of Mackey, 22 Tex. Civ. App. 145, 54 S. W. Rep. 33.

[2] Rust v. Victoria Graving Dock Co., *supra;* Robb v. Carnegie, 145 Pa. 324, 22 Atl. Rep. 649, 27 Am. St. 694, 14 L. R. A. 329; San Antonio v. Estate of Mackey, 22 Tex. Civ. App. 145, 54 S. W. Rep. 33, citing the text.

[3] Trinity & S. R. Co. v. Schofield, 72 Tex. 496, 10 S. W. Rep. 575.

The recovery of damages for maintaining a nuisance in a highway must be limited to the land described in the complaint, notwithstanding the plaintiff owned other land in close proximity to that described. Pittsburgh, etc. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. Rep. 332.

[4] Shaw v. Cummiskey, 7 Pick. 76; Watson v. New Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. St. 345; Reichert v. Backenstross, 71 Hun, 516, 24 N. Y. Supp. 1009.

[5] Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. Rep. 365; Sayre v. State, 123 N. Y. 291, 25 N. E. Rep. 163; Sherman v. Fall River Iron

expenditures reasonably made to guard against additional injury;[1] but interest on such expenditures cannot generally be recovered in New York.[2] In Missouri interest may be recovered on money expended to prevent further damage or to remedy the injury done.[3] In Ohio interest has been held to be recoverable as part of the damages from the time the injury was sustained.[4] And in New York, where the claim was against the state and payment of it was delayed by unsuccessful litigation, interest was allowed from the time the claim was filed.[5]

The cost of restoring property to its previous condition is the proper measure of damages for injury thereto when it is less than the diminution in the market value of the property by reason of the injury; but if the cost of restoration would exceed the diminution in value, the latter measures the damages.[6] The owner of logs scattered and delayed by reason of a boom by which the defendant obstructed a floatable stream has been allowed the depreciation in the market value during the detention, for loss of logs carried away and the expense of searching for others.[7] A plaintiff who occupies a home on leased ground is not limited to the recovery of the diminished rental value of it, but may be compensated for any actual inconvenience and physical discomfort which materially affected the comfortable and healthful enjoyment and occupancy of

Works, 2 Allen, 524, 79 Am. Dec. 799; Bardeen v. Portage, 79 Wis. 126, 48 N. W. Rep. 210; Jutte v. Hughes, 67 N. Y. 267; Kankakee, etc. R. Co. v. Horan, 22 Ill. App. 145; Chicago, etc. R. Co. v. Carey, 90 Ill. 514; Springfield v. Griffith, 46 Ill. App. 246; Chesapeake & O. R. Co. v. Gross, 19 Ky. L. Rep. 1926, 43 S. W. Rep. 203; Hughes v. Austin, 12 Tex. Civ. App. 178, 33 S. W. Rep. 607; Paddock v. Somes, 51 Mo. App. 320, 326.

[1] Comstock v. New York, etc. R. Co., 48 Hun, 225.

[2] Sayre v. State, 123 N. Y. 291, 25 N. E. Rep. 163.

[3] Paddock v. Somes, 51 Mo. App. 320, 326.

[4] Toledo v. Grasser, 12 Ohio Ct. Ct. 520.

[5] Lakeside Paper Co. v. State, 45 App. Div. 112, 60 N. Y. Supp. 1081, 55 App. Div. 208, 66 N. Y. Supp. 959.

[6] Hartshorn v. Chaddock, 135 N. Y. 116, 17 L. R. A. 426, 31 N. E. Rep. 997; Stevenson v. Ebervale Coal Co., 201 Pa. 112, 50 Atl. Rep. 818, 88 Am. St. 805; Mellick v. Pennsylvania R. Co., 203 Pa. 457, 53 Atl. Rep. 340; Gift v. Reading, 3 Pa. Super. Ct. 359; Lentz v. Carnegie, 145 Pa. 612, 23 Atl. Rep. 219, 27 Am. St. 717; Eshleman v. Martic, 152 Pa. 68, 25 Atl. Rep. 178; Williams v. Fulmer, 151 Pa. 405, 25 Atl. Rep. 103, 31 Am. St. 767. See § 1047.

[7] Plummer v. Penobscot Lumber Ass'n, 67 Me. 363.

his home, as well as for any actual injury to his health or property caused by the nuisance.[1] The damages to a lot-owner resulting from the temporary obstruction of an alley to which his lot runs back, and which he uses in common with others, are measurable by the diminished value of the use during the time the obstruction continued.[2] This rule may be inapplicable to property owned and rented by the plaintiff, but it was not so as to property which he permitted a son to occupy free of charge.[3] Where the water of a spring is damaged the recovery is measured by the injury sustained in being deprived of the water for domestic or farm purposes. It cannot be shown that the plaintiff had sold water from the spring, it not appearing that it was entirely destroyed.[4] For the continuous discharge of culm into a stream whereby it constantly accumulates in a mill dam and race, the mill being equipped for both steam and water power, there may be a recovery for the increased cost of running the mill by steam, in so far as the use of steam was made necessary by the defendant's acts, and for the cost of cleaning out the dam and race. If an injunction is granted to prohibit the continuance of the nuisance there cannot be a recovery of the cost of a new arrangement of gateways and sluices intended to keep the mill and race clear in the future.[5]

§ **1049. Injuries to crops, trees, etc.** For injury done to the plaintiff's crops by flowing his land he is entitled to recover their value, standing upon it, so far as destroyed, and the depreciation in value of such as are only injured or partially destroyed.[6] If the seed planted is not up when destroyed

[1] Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 62 N. W. Rep. 336; Pierce v. Wagner, 29 Minn. 355, 13 N. W. Rep. 170; Mansfield v. Hunt, 19 Ohio Ct. Ct. 488.

[2] Bannon v. Rohmeiser, 17 Ky. L. Rep. 1378, 34 S. W. Rep. 1084, 35 id. 280.

[3] Bannon v. Murphy, 18 Ky. L. Rep. 989, 38 S. W. Rep. 889.

[4] Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. Rep. 937, 7 L. R. A. 451.

In such a case the recovery is not limited to the cost of removing the nuisance. Louisville & N. R. Co. v. Simpson, 17 Ky. L. Rep. 989, 33 S. W. Rep. 395.

[5] Keppel v. Lehigh Coal & N. Co., 200 Pa. 649, 50 Atl. Rep. 302.

[6] Sabine, etc. R. Co. v. Joachimi, 58 Tex. 456; Chicago, etc. R. Co. v. Carey, 90 Ill. 514; Same v. Schaffer, 26 Ill. App. 280; Drake v. Chicago, etc. R. Co., 63 Iowa, 302, 19 N. W. Rep. 215, 50 Am. Rep. 746; Byrne v. Minneapolis, etc. R. Co., 38 Minn. 212, 8 Am. St. 668, 36 N. W. Rep. 339; G., C. & S. F. R. Co. v. Holliday, 65

its value is to be estimated upon the basis of the rental value of the land and the cost of seed and labor;[1] if the crop is partially grown there may be a recovery, also, for the labor of cultivating it.[2] In Texas and South Carolina interest is allowed on the value of the crop destroyed or the amount of its depreciation from the date thereof.[3] In the former state a majority of one of the courts of appeals has expressed the opinion that a recovery may be had for the loss of any number of crops, notwithstanding that in the year in which they were destroyed, and subsequent to the loss, a crop was secured on the same land, and that the measure of damages for the loss of each crop is its value at the time it was destroyed regardless of the value of the crop secured.[4] In determining the value of a growing crop it is competent to show any fact or circumstance pertaining to its condition and prospects; and the jury may consider whatever it may be presumed would have been considered by a careful person desiring to buy the land.[5] In South Carolina

Tex. 513; Gulf, etc. R. Co. v. Pool, 70 id. 713, 8 S. W. Rep. 535; Trinity & S. R. Co. v. Schofield, 72 Tex. 496, 10 S. W. Rep. 575; Folsom v. Apple River Log Driving Co., 41 Wis. 602; Adams v. Stadler, 78 Ill. App. 432; St. Louis v. Merchants' Bridge Terminal R. Co., 84 Ill. App. 116; Young v. Gentis, 7 Ind. App. 199, 32 N. E. Rep. 796; Chicago & E. R. Co. v. Barnes, 10 Ind. App. 460, 38 N. E. Rep. 428. See § 1023.

In case of injury to crops the net loss is all that can be recovered — their market value over the cost of producing, harvesting and marketing. Shotwell v. Dodge, 8 Wash. 337, 343, 36 Pac. Rep. 254, citing Lommeland v. St. Paul, etc. R. Co., 35 Minn. 412, 29 N. W. Rep. 119; Holden v. Lake Co., 53 N. H. 552; Smith v. Chicago, etc. R. Co., 38 Iowa, 518; Sedgwick on Dam., §§ 191, 937.

[1] Ohio & M. R. Co. v. Nuetzel, 43 Ill. App. 108, 113.

[2] Lampley v. Atlantic Coast Line R. Co., 63 S. C. 462, 41 S. E. Rep. 517.

[3] Id.; G., C. & S. F. R. Co. v. Holliday, Trinity & S. R. Co. v. Schofield, *supra*.

[4] Galveston, etc. R. Co. v. Parr, 8 Tex. Civ. App. 280, 28 S. W. Rep. 264.

[5] Drake v. Chicago, etc. R. Co., 63 Iowa, 302, 19 N. W. Rep. 215, 50 Am. Rep. 746; Economy Light & Power Co. v. Cutting, 49 Ill. App. 422.

"The most satisfactory means of arriving at the value of a growing crop is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation as well as the cost of its preparation and transportation to market. The difference between the value of the probable crop in the market and the expense of maturing, preparing and placing it there will in most cases give the value of the growing crop with as much certainty as can be obtained by any other method." International R. Co. v. Pape, 73 Tex. 501, 11 S. W. Rep. 526. See § 1023.

the value of immature or growing crops destroyed is ascertained by the rental value of the land, the cost of seed, labor and fertilizer, and interest on these. Evidence of the net result in the yield and sale of crops of the same kind during years previous to the destruction of the crop in question and during that year is inadmissible.[1] In Maryland testimony as to the value of the crops destroyed and those which the plaintiff was prevented from raising is inadmissible because too speculative.[2]

Where grass is submerged and its value has been recovered the owner is not entitled to recover the amount paid for other pastures nor the expense of driving his animals to them. The value of milk which cows would have given if they had not been prevented from grazing on lands owned by others than the plaintiff is too remote. But if, in consequence of an overflow of lands, animals are drowned either upon plaintiff's lands or the lands of others the wrong-doer is liable for their value.[3] If the growth of grass is prevented and the owner is deprived of the use of a pasture for a considerable time his damages are measured by the value of the use of the land for pasturage in the condition it would have been but for the wrong done. Starvation of animals cannot be added to that measure because the damages would be doubled, and, besides, that loss is too remote.[4] For depriving a party of the use of land by a nuisance recovery can be had only of the rental value; not the supposed value of what might have been raised by cultivation, less the cost of raising and marketing crops.[5]

[1] Horres v. Berkeley Chemical Co., 57 S. C. 189, 35 S. E. Rep. 500.

[2] New York, etc. R. Co. v. Jones, 94 Md. 24, 50 Atl. Rep. 423.

[3] Sabine, etc. R. Co. v. Johnson, 65 Tex. 389; Broussard v. Sabine, etc. R. Co., 80 id. 329, 16 S. W. Rep. 30; Hughes v. Austin, 12 Tex. Civ. App. 178, 33 S. W. Rep. 607.

[4] Broussard v. Sabine, etc. R. Co., 80 Tex. 329, 16 S. W. Rep. 30.

[5] Chicago v. Huenerbein, 85 Ill. 594, 28 Am. Rep. 626; Galveston, etc. R. Co. v. Chittim, 71 S. W. Rep. 294 (Tex. Ct. of Civ. App.).

The rules deducible from the Illinois cases are thus stated by Baker, J., in Kankakee & S. R. Co. v. Horan, 17 Ill. App. 650: "1st. That for lands plaintiff was prevented from tilling he is entitled to recover the rental value. 2d. That for the lands where the crops were not up the damage should be estimated upon the basis of the rental value, and the cost of seed and labor in breaking up and planting or sowing. 3d. That in cases of destruction where the crops were up or more or less matured, plaintiff should recover as is last

For injuries done to a house, grounds, fruit-trees and garden by water turned on the land by the defendant in constructing a railway the damages may be ascertained in favor of the owner by the difference between the value of the premises before and their value immediately after the injury, taking into account only the damages which have resulted from the defendant's acts.[1] Under such circumstances the owner is bound to use reasonable care, skill and diligence adapted [416] to the occasion to save his property from being injured by the water, notwithstanding it came on his premises by the fault and negligence of the defendant.[2] Where debris was deposited

above stated, and in addition thereto the cost of any labor bestowed after the planting or sowing; or, at his option, he may recover the value of the crop at the time of its destruction, with the right to the purchaser to mature the crop and harvest or gather it. 4th. That where the crop was injured but not destroyed, the assessment should be commensurate with the depreciation in value."

[1] Chase v. New York, etc. R. Co., 24 Barb. 273; Trinity & S. R. Co. v. Schofield, 72 Tex. 496, 10 S. W. Rep. 575; Louisville, etc. R. Co. v. Sparks, 12 Ind. App. 410, 49 N. E. Rep. 546; Willitts v. Chicago, etc. R. Co., 88 Iowa, 281, 288, 21 L. R. A. 608, 55 N. W. Rep. 313; Kansas Zinc Mining & Smelting Co. v. Brown, 8 Kan. App. 802, 57 Pac. Rep. 304; Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388; Hopkins v. Butte & Montana Commercial Co., 16 Mont. 356, 40 Pac. Rep. 865; Fremont, etc. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. Rep. 263, 61 Am. St. 578, 36 L. R. A. 417; Koch v. Sackman-Phillips Investment Co., 9 Wash. 405, 37 Pac. Rep. 703.

The Arkansas court objected to this statement of the rule in a case where lands were overflowed as the result of the erection of a levee, because it ignores the fact that owing to the improvement there may have been a shrinkage in the value of the property, although the work was skilfully done. "The true rule, and the one in this case easily applicable by a jury of practical men, was to take the actual value of the land at the time the work was completed, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as formerly, and fix the damages at the difference. This allows all appreciation of land to complainant and affords just compensation for want of care and skill." Railway Co. v. Morris, 35 Ark. 622.

In South Carolina the diminished value of the land is the measure of recovery; but in ascertaining that it is not permissible to consider the value of a crop thereon. "For, besides the fact that there is no allegation in the complaint of any damage sustained by loss of crops, either present or prospective, it seems to us that damages resulting from a loss of, or injury to, crops which might have been made, are altogether too remote and speculative, depending upon too many uncertain contingencies, to be allowed in a case like this." Gentry v. Richmond, etc. R. Co., 38 S. C. 284, 16 S. E. Rep. 893.

[2] Chase v. New York, etc. R. Co., 24 Barb. 273; Sabine, etc. R. Co. v. Joachimi, 58 Tex. 456.

upon a city residence lot and fences, walks, trees, shrubbery and outhouses were injured thereby, the damages were ascertainable by the sum which it would cost to put the premises in as good condition as they were in before the wrong was done, less such benefit as they received from the deposit.[1] Where crops were injured by the smoke and gas produced in manufacturing coke and it was claimed that there was a permanent impairment of the productiveness of the soil by the formation on its surface of sterilizing and poisonous substances, it was held that the rule which governs the ascertainment of damages in condemnation proceedings did not apply; in other words, there could not be a recovery for the depreciation in the selling value of the farm.[2] The extent of the depreciation in the producing qualities of the farm was best provable by a chemical analysis of the soil, and that depreciation and the damage sustained by crops which had been secured afforded the basis for measuring the defendant's liability.[3]

There cannot be a recovery for the loss of crops if the plaintiff knew when he planted that they would be flooded and destroyed.[4] But it has been held that a gardener was justified in putting in a crop after the defendant had closed a crossing which he used upon the assumption that the wrongful act would be discontinued and that he would have access to a market.[5] Where the sale of products was thus prevented the wrong-doer was liable for the loss of profits.[6] The owner of rented land cannot recover for damage done to crops on such part thereof as was held by tenants who had paid the stipulated rent.[7]

§ 1050. Liability for remoter consequences. Where the plaintiff is the owner and occupier of the land affected by the nuisance the particular circumstances of the injury may be taken into account and damages given, not only for the diminished value of his use and for any peculiar annoyance suffered

[1] Koch v. Sackman-Phillips Investment Co., 9 Wash. 405, 37 Pac. Rep. 705.

[2] This proposition is adhered to in a case stated in § 1053.

[3] Robb v. Carnegie, 145 Pa. 324, 342, 22 Atl. Rep. 649, 27 Am. St. 694, 14 L. R. A. 329.

[4] Willitts v. Chicago, etc. R. Co., 88 Iowa, 281, 288, 55 N. W. Rep. 313.

[5] Galveston, etc. R. Co. v. Baudat, 21 Tex. Civ. App. 236, 51 S. W. Rep. 541.

[6] Id.

[7] St. Louis, etc. R. Co. v. Trigg, 63 Ark. 536, 40 S. W. Rep. 579.

or expense rendered necessary or incurred in respect thereto, but also for any act which permanently injures the inheritance. For the unauthorized maintenance of a dam so as to overflow his land he may recover damages for loss of the use of a ford which he had habitually used in moving crops and wood from one part of his farm to another, and for the loss of growing timber killed by such overflow prior to the suit, though the timber did not in fact die until afterwards.[1] A city authorized a canal corporation to change the course of a sewer into which a street and house were drained, the owner of the latter having consented to the corporation's making the change on its promise to hold him harmless from the consequences. The drain became obstructed and the water flowed back into the house. In an action against the city for the obstruction, under a declaration alleging that the defendants obstructed the drain so that water and filth flowed into the plaintiff's cellar and destroyed his property therein and put him to trouble and expense to get the water out, the plaintiff was held entitled to damages for any injury which affected his estate or diminished its value for use and occupation by reason of the inconvenience and annoyance of flooding the cellar and of unwholesome and disagreeable smells, or of insects thereby generated or attracted to the house; and also his reasonable expense in preventing or removing the nuisance and of changes and repairs thereby rendered necessary, and which he could not, by reasonable care and diligence, have avoided.[2] Where a sewer caved in, a property owner recovered for permanent injury to his building the cost of repairs and for the loss of rent during the time they were being made.[3]

If the diversion of water prevents the running of a mill there may be a recovery for the loss of the use thereof, and evidence of what the mill had previously earned may be received.[4] Where the defendant withheld water which furnished the motive power of a mill fully equipped with workmen and appliances and had been in profitable operation, the plaintiff was held to be entitled to recover for loss of profits if he could show

[1] Hayden v. Albee, 20 Minn. 159.

[2] Emery v. Lowell, 109 Mass. 197; Mayor, etc. v. Small, 108 Ga. 309, 323 34 S. E. Rep. 152.

[3] Vanderslice v. Philadelphia, 103 Pa. 102.

[4] Woodin v. Wentworth, 57 Mich. 278, 23 N. W. Rep. 813.

with reasonable certainty what they amounted to and that their loss was the direct result of the wrong done. If the claimant's proof did not appear to be reasonably satisfactory as to the amount of the loss, then the value of the use of the water to him, situated as it was, could have been resorted to.[1] This would mean, the value of the use of the water to the mill, fully equipped with workmen, whose wages must be paid and which was operating at a profit, not the mere rental value of the real estate to a lessee who would hire his own workmen.[2] If the recovery is for lost profits there should be added thereto the amount necessarily paid for wages during the time the mill was not operated because of the wrong of the defendant. These being recovered, there should not also be a recovery for the rental value of the mill.[3] The evidence in a case in which damages are sought for the obstruction or detention of the natural flow of water must be such as to afford a basis for ascertaining the injury done upon the theory that the plaintiff was entitled to that flow only, and not by the profits made in a year when the plaintiff had the use of more than the natural flow of water and more than he was entitled to.[4] Injury resulting from the spreading of noxious weeds over land is not too remote to be recovered for, the defendant having provided an insufficient ditch to carry off water.[5]

§ 1051. Same subject. A railroad company, by permitting a horse killed by its locomotive to remain on the side of its [417] track so near an adjacent house as to render its occupancy unwholesome, is subject to an action by the owner thereof, and he may show, not only the sickness of himself, but also of his wife, his family and its different members to affect the damages.[6] Such a company has been held liable for an injury to a traveler on a highway resulting from the fright of a horse by the odor arising from the body of an animal which had been so killed and left on its land adjacent to the highway. Such injury is the natural and probable consequence of the nuisance.[7] A plaintiff suffering from a nuisance by

[1] Pollitt v. Long, 58 Barb. 20.

[2] Lakeside Paper Co. v. State, 45 App. Div. 112, 60 N. Y. Supp. 1081.

[3] Weeks v. State, 48 App. Div. 357, 63 N. Y. Supp. 203.

[4] Weare v. Chase, 93 Me. 264, 44 Atl. Rep. 900.

[5] Illinois Central R. Co. v. Heisner, 45 Ill. App. 143.

[6] Ellis v. Kansas City, etc. R. Co., 63 Mo. 131; Jarvis v. St. Louis, etc. R. Co., 26 Mo. App. 253.

[7] Louisville & N. R. Co. v. Wade, 11 Ky. L. Rep. 904 (Ky. Super. Ct.).

water flooding the ground about his house, destroying his shrubbery and garden and injuring the health of his family, may not only recover for the injury to the house and lot, but he may prove physicians' bills paid, loss of time of his family on account of sickness caused by stagnant water, not as constituents of the measure of damages, but for the purpose of showing the extent to which the value of the property has been lessened by reason of the acts complained of.[1] Unhealthiness resulting from a nuisance is an element of damage,[2] at least to the extent of the time lost and expense incurred on account of it.[3] The later cases go further and allow the recovery of such sums "as will fairly and reasonably compensate for the bodily sickness, pain and discomfort" suffered by reason of the nuisance,[4] either by the plaintiff or his family,[5] and also for the mental suffering of a person injured in body.[6] In a recent Georgia case the trial court instructed in favor of the recovery of the diminished rental value, and also for the destruction of the home and its enjoyments, including physical discomforts and pain. This was said to be error because it permitted the recovery of double damages.[7] But it is held elsewhere that if a homestead is affected the owner may re-

[1] Kemper v. Louisville, 14 Bush, 87; Francis v. Schoellkopf, 53 N. Y. 152; Wiel v. Stewart, 19 Hun, 272; Lockett v. Fort Worth, etc. R. Co., 78 Tex. 211, 14 S. W. Rep. 564; Cleveland, etc. R. Co. v. King, 23 Ind. App. 573, 582, 55 N. E. Rep. 875, quoting the text.

[2] Eufaula v. Simmons, 86 Ala. 515, 6 So. Rep. 47; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Aurora v. Gillett, 56 Ill. 132; Hunt v. Lowell Gas Light Co., 8 Allen, 169, 85 Am. Dec. 697; French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. Rep. 113; Allen v. Boston, 159 Mass. 324, 34 N. E. Rep. 519, 38 Am. St. 423; Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 62 N. W. Rep. 336; Pelmothe v. Phillips, 20 N. S. W. L. R. 58; Gempp v. Bassham, 60 Ill. App. 84.

[3] Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. Rep. 172; Paris v. Allred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62; Munk v. Watertown, 67 Hun, 261, 22 N. Y. Supp. 227; Rosenheimer v. Standard Gas Light Co., 36 App. Div. 1, 55 N. Y. Supp. 192, citing Chapman v. Rochester, 110 N. Y. 273, 18 N. E. Rep. 88, 6 Am. St. 366, 1 L. R. A. 296. Schmidt v. Cook, 12 N. Y. Misc. 449, 33 N. Y. Supp. 624; Fischer v. Sanford, 12 Pa. Super. Ct. 435; Swift v. Broyles, 115 Ga. 885, 888, 42 S. E. Rep. 277; Brown v. Chicago & A. R. Co., 80 Mo. 457, are to the same effect.

[4] Ferguson v. Firmenich Manuf. Co., 77 Iowa, 576, 42 N. W. Rep. 448, 14 Am. St. 319.

[5] Pierce v. Wagner, 29 Minn. 355, 13 N. W. Rep. 170.

[6] Louisville & N. R. Co. v. Wade, 11 Ky. L. Rep. 90 (Ky. Super. Ct.).

[7] Swift v. Broyles, *supra*.

cover, in addition to its rental value, for the inconvenience and discomfort suffered and the deprivation of the comfortable enjoyment of it by himself and his family.[1] The same elements enter into the damage to a religious corporation when the nuisance interferes with the holding of its regular services.[2] One who occupies his home is not required to leave it, but may assume that the nuisance will be abated. "The diminution of the rental value of the premises during the continuance of the nuisance was not the limitation of plaintiff's right to recover, but he might have damages for actual inconvenience and physical discomforts which materially impaired the healthful enjoyment and occupancy of his home, and for actual injury to his property caused directly thereby without his fault."[3]

According to some courts the scope of liability is less extended where the nuisance is caused by a drain or sewer constructed by a municipality, which drain or sewer becomes choked with refuse and overflows the premises of an adjacent land-owner. The corporation is liable only for the damage done to the property, not for physicians' bills, medicines, increased family expenses, loss of time or mental anguish resulting from illness caused by the sewer or drain.[4] The New York case cited is not authority for this doctrine in its full extent, at least if the person injured in health was not the owner of the premises affected by the nuisance. That case was much relied on by the North Carolina court, which makes no mention of the ground upon which the court based its judgment. The North Carolina court rested its decision upon the theory that the rule of liability as to municipal corporations is quite different from that of individuals or private corporations. "In actions for damage against a municipal corporation, where the

[1] Pierce v. Wagner, *supra;* Randolf v. Bloomfield, 77 Iowa, 50, 41 N. W. Rep. 562, 14 Am. St. 268; Gempp v. Bassham, 60 Ill. App. 84; § 1047; Churchill v. Burlington Water Co., 94 Iowa, 89, 62 N. W. Rep. 646; Weston Paper Co. v. Pope, 155 Ind. 394, 402, 57 N. E. Rep. 719. See Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. Rep. 221.

[2] Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. Rep. 719.

[3] Anderson v. Chicago, etc. R. Co., 85 Minn. 337, 88 N. W. Rep. 1001; Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 62 N. W. Rep. 336.

[4] Williams v. Greenville, 130 N. C. 93, 89 Am. St. 860, 57 L. R. A. 207, 40 S. E. Rep. 977 (one judge dissented); Hughes v. Auburn, 161 N. Y. 96, 55 N. E. Rep. 389, 46 L. R. A. 636.

act complained of was done in pursuance of its legislative or judicial powers, or in the exercise of its authorized police powers, the doctrine of *respondeat superior* does not apply except as to property rights. And such defendant is only liable for injuries caused by neglect to perform some *positive duty* devolved upon it by reason of its incorporation, such as keeping the public streets in repair, or damage to property, or when it receives a pecuniary benefit from it. The reason for this distinction, that it is liable [as to its liability] for damage, seems to lie in the fact of ownership — vested rights, which no one has the right to invade, not even the government, unless it be for public purposes, and then only by paying the owner for it. This right to take property does not fall under the doctrine of police power, and the doctrine of *respondeat superior* applies." This reasoning is not convincing; the objections to it will readily occur to the professional mind. The distinction which is attempted to be made is not recognized in the cases generally, and, therefore, it has not been answered by judicial argument. In a Massachusetts case, however, the point was made by counsel that the only damage a plaintiff could recover from the defendant city for the injury done him by a sewer placed in a highway, which leaked into his cellar, and was not upon his property, was for such as affected his property, and that injury to his health or business was wrongly allowed to be included in the damages. The answer was such damages were specially alleged, and are clearly recoverable.[1] In a later case[2] the trial court was of opinion that the liability of a city for disconnecting a sewer was limited to the expense the plaintiff would incur by connecting his estate with a new sewer. The reviewing court regarded this as error. If the plaintiff was entitled to recover at all, he was entitled to all the damages to his estate that were the natural and proximate result of the act complained of, and such as reasonably might be supposed to have been within the contemplation of the parties, if, at the time of the doing of the act, they had taken thought of the consequences likely to ensue. Applying this

[1] Allen v. Boston, 159 Mass. 324, 34 N. E. Rep. 519, 38 Am. St. 423, citing Hunt v. Lowell Gas Light Co., 8 Allen, 169, 85 Am. Dec. 697; French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. Rep. 113.

[2] O'Brien v. Worcester, 172 Mass. 348, 52 N. E. Rep. 385.

rule, the plaintiff was entitled to recover for injury to the real estate and reasonable compensation for his trouble and expense in respect to his property, unless and except to the extent to which, by reasonable care and precaution, he could have guarded against such injury.

In a Texas case in which, as a result of the obstruction of a highway, the plaintiff's children were unable to attend school, and he lost his proportion of the school fund, he was entitled to recover that sum unless the difficulty could have been surmounted by the expenditure of a less amount.[1] The working of quarries and blasting of rock, whereby large quantities of stones are thrown upon the dwelling-house and premises of plaintiff, breaking the doors, windows and roof, is, as to such injuries, a trespass; and if by such operations persons on and about the premises are kept in continual fear and jeopardy of their lives, rendering a proper attention to business full of apprehension and danger, such acts constitute a nuisance, and in case therefor the damages for diminution of the value of the property for the purpose of renting, and the prevention of the plaintiff's servants from performing their labor, and for injury from leakage in the roof through holes so caused, may be recovered.[2] The owner of a ferry established by law may have an action against another who sets up a ferry in opposition to him without authority, and uses unwarrantable means to divert his customers; and may recover the defendant's clear gains from the rival ferry.[3] One who wrongfully builds a levee on the land of another will not be made to answer for the damages caused by cutting it by a mob, such damages being too remote.[4] Clearly there was an intervening cause. A florist who has sold injured plants supposing them to be sound cannot recover for the injury resulting to his business reputation. Such damage is altogether too shadowy and indirect for legal consideration, and must be regarded as an unexpected, unnatural and accidental consequence of the defendants' wrong.[5] If sewage is turned into a stream which runs

[1] Sabine, etc. R. Co. v. Johnson, 65 Tex. 389.

[2] Scott v. Bay, 3 Md. 431.

[3] Stark v. McGowen, 1 N. & McC. 387, 9 Am. Dec. 712; Chenango Bridge Co. v. Lewis, 63 Barb. 111.

[4] Bentley v. Fischer Lumber & Manuf. Co., 51 La. Ann. 451, 25 So. Rep. 262.

[5] Dow v. Winnipesaukee Gas & Electric Co., 69 N. H. 312, 41 Atl. Rep. 288, 76 Am. St. 173, 42 L. R. A. 569.

through a farm, experts may testify as to bacteria being in the water, how far the germs may be carried, and the dangers resulting therefrom.[1]

§ 1052. Exemplary damages. One who creates a nuisance with malice or wantonness subjects himself to exemplary damages;[2] but these should not be awarded for the continuance of a nuisance if it has been abated with reasonable promptness.[3] If a nuisance is not abated after an action is brought to recover damages therefor that fact may be considered in determining whether exemplary damages should be awarded or not; but the fact that there is a failure to abate it during the pendency of a bill in equity to restrain the continuance of it has no bearing upon that question.[4] The continuance of a nuisance after its existence has been judicially declared is cause for imposing exemplary damages.[5]

§ 1053. Removal of lateral support to land. The removal of the lateral support of land which causes it to drop away is a legal injury for which the owner is entitled to damages. There is incident to the land in its natural condition an absolute right of support from that adjoining; and if land not [418] subject to artificial pressure sinks and falls away in consequence of the removal of such support, the owner of the latter is entitled to damages to the extent of the injury.[6] Such right exists

[1] Hollenbeck v. Marion, 116 Iowa, 69, 89 N. W. Rep. 210.

[2] Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Besso v. Southworth, 71 Tex. 765, 10 S. W. Rep. 523, 10 Am. St. 814; Central of Georgia R. Co. v. Windham, 126 Ala. 552, 560, 28 So. Rep. 392; Louisville & N. R. Co. v. Bolton, 18 Ky. L. Rep. 824, 38 S. W. Rep. 498; Bentley v. Fischer Lumber & Manuf. Co., 51 La. Ann. 451, 456, 25 So. Rep. 262; Walker v. Vicksburg, etc. R. Co., 52 La. Ann. 2036, 28 So. Rep. 324; Berlin v. Thompson, 61 Mo. App. 234; Williams v. Fulmer, 151 Pa. 405, 25 Atl. Rep. 103, 31 Am. St. 767.

[3] Oursler v. Baltimore & O. R. Co., 60 Md. 358.

[4] Keiser v. Mahanoy City Gas Co., 143 Pa. 276, 22 Atl. Rep. 759.

[5] Standard Oil Co. v. Kinnaird, 13 Ky. L. Rep. 269 (Ky. Super. Ct.); Paddock v. Somes, 51 Mo. App. 320. See § 1038.

[6] McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Thurston v. Hancock, 12 Mass. 220; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771; Beard v. Murphy, 37 Vt. 99, 86 Am. Dec. 693; Farrand v. Marshall, 19 Barb. 380; Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570; Baltimore, etc. R. Co. v. Reaney, 42 Md. 117; Charless v. Rankin, 22 Mo. 566; Hay v. Cohoes Co., 2 N. Y. 172; Carlin v. Chappel, 101 Pa. 348, 47 Am. Rep. 722; Stimmel v. Brown, 7 Houst. 219, 30 Atl. Rep. 996; Rigney v. Chicago, 102 Ill. 64, citing the text; Moellering v. Evans, 121 Ind. 195, 22 N. E. Rep. 989, 6 L. R. A. 449; Schultz v. Bower, 57

against the public as well as against an individual,[1] and, according to the preponderance of authority, it exists against a railroad company.[2] The courts are not agreed as to the measure of the wrong-doer's liability. The weight of authority favors the view that it is not the cost of restoring the lot to its former situation or building a wall to support it, but is the diminution of its value by reason of the defendant's act.[3] The existence of the excavation is not an element of the injury, but the lessened value of the plaintiff's land by reason of the falling, caving or washing of the soil as the natural result of the removal of its lateral support.[4] It has been decided, though, as it seems, upon untenable ground, that in estimating the difference in the value of the land the entire lot and the improvements on it may be taken as the value of the land alone.[5] All the damages which may reasonably be apprehended to result from the wrong done are recoverable in one action.[6]

Minn. 493, 59 N. W. Rep. 631, 47 Am. St. 630; Ulrick v. Dakota Loan & Trust Co., 2 S. D. 285, 49 N. W. Rep. 1054, citing the text; Mosier v. Oregon Navigation Co., *infra*, citing the text; Matulys v. Philadelphia & R. Coal & Iron Co., 201 Pa. 70, 50 Atl. Rep. 823.

[1] Stearns v. Richmond, 88 Va. 992, 14 S. E. Rep. 847, 29 Am. St. 758; Parke v. Seattle, 5 Wash. 1, 20 L. R. A. 68, 31 Pac. Rep. 310, 34 Am. St. 839; Smith v. Seattle, 20 Wash. 613, 56 Pac. Rep. 389.

[2] Mosier v. Oregon Navigation Co., 39 Ore. 256, 64 Pac. Rep. 453; McCullough v. St. Paul, etc. R. Co., 52 Minn. 12, 53 N. W. Rep. 802; Roushlange v. Chicago & A. R. Co., 115 Ind. 106, 17 N. E. Rep. 198; Richardson v. Vermont Central R. Co., 25 Vt. 465, 60 Am. Dec. 283; Larson v. Metropolitan Street R. Co., 110 Mo. 234, 19 S. W. Rep. 416, 16 L. R. A. 330; Baltimore & P. R. Co. v. Reaney, 42 Md. 117; Costigan v. Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. Rep. 810. *Contra*, Horstman v. Covington & L. R. Co., 18 B. Mon. 218; Boothby v. Androscoggin & K. R. Co., 51 Me. 318.

[3] McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Moellering v. Evans, 121 Ind. 195, 22 N. E. Rep. 989, 6 L. R. A. 449, quoting the text; Schultz v. Bower, 57 Minn. 493, 59 N. W. Rep. 631, 47 Am. St. 630; Ulrick v. North Dakota Loan & Trust Co., 2 S. D. 285, 49 N. W. Rep. 1054, citing the text. Compare Snarr v. Granite C. & S. Co., 1 Ont. 102. See § 1017.

[4] Schultz v. Bower, 64 Minn. 123, 66 N. W. Rep. 139.

[5] Williams v. Missouri Furnace Co., 13 Mo. App. 70.

[6] Id.; Lamb v. Walker, 3 Q. B. Div. 389; Jones v. Seattle, 23 Wash. 753, 63 Pac. Rep. 553, quoting the text. But see § 114 *et seq.*

Where the defendant by removing the lateral support of his land caused the asphalt or pitch which formed the main ingredient of the plaintiff's land to melt and ooze forth into his own land and appropriated it to his own use, damages were recoverable both for the injury caused by the subsidence and for loss of the pitch.

In Massachusetts and Pennsylvania a different measure of damages is favored. Chief Justice Gray, after stating that the plaintiff's bank was left in such a condition that, by the effect of rains and frost, it was rendered insufficient to hold his soil in its natural condition, said: "The necessary inference is that by the operation of natural and ordinary causes upon the land as it was left by the excavations of the defendant, and which he took no precaution to guard against, part of the soil of the plaintiff's land slid and fell off; and for the injury so caused to her soil this action may be maintained. But she cannot maintain an action for the injury to her fences and shrubbery, because her natural right and her corresponding remedy are confined to the land itself, and do not include buildings or other improvements thereon. . . . It is agreed that the damages occasioned to the plaintiff by loss of, and injury to, her soil alone, caused by the acts of the defendant, amount to $95. We are of opinion that she can recover that sum and no more. She is clearly not entitled to recover the cost of putting her land into, and maintaining it in, its former condition, because that is no test of the amount of the injury. She cannot recover the difference in market value because it does not appear that that difference is wholly due to the injury to her natural right in the land; it may depend upon the present shape of the lot, upon the improvements thereon, or upon other artificial circumstances which have nothing to do with the natural condition of the soil."[1] In a Pennsylvania case the trial court allowed a recovery of damages upon the rule that applies where property is taken or injured in the exercise of the right of eminent domain. This was held erroneous. That rule is

Trinidad Asphalt Co. v. Ambard, [1899] App. Cas. 594.

In an action against a city to recover for the removal of lateral support in grading a street the depreciation in the value of the plaintiff's property caused by an approaching slide, although the slide began to approach the property two years prior to the commencement of the action, should not be considered in fixing the damages. Smith v. Seattle, 20 Wash. 613, 56 Pac. Rep. 389.

Where a prescriptive right to the support of a wall existed and a partly built wall fell because of an excavation made on adjoining land the defendant was liable for the loss of rent caused by delay in erecting buildings of which such wall formed part, and for architect's fees incurred by the plaintiff in supervising the re-erection of such wall. A'Beckett v. Warburton, 14 Vict. L. R. 308.

[1] Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

adopted, said the supreme court, because there is a lawful right to inflict the injury, and the damage is permanent in its character and requires a compensation which shall be the price of the privilege to continue it. But in the ordinary actions between private persons to recover damage for trespass upon land the injury is to be compensated by allowing the actual damage sustained up to the time suit was brought. This compensation is to be ascertained, not by showing the difference in the market value of the land before and after the injury, but by proving what was the precise and actual damage done by the defendant to the plaintiff's land. In the particular class of cases here involved the right to compensation is more than usually restricted because of the peculiar manner in which the injury is inflicted, and on account of the relative rights of the parties. The view of the Massachusetts court was approved. "To hold that the proper measure of damages is the diminution in the value of the lot, as affected by the acts of the defendant, is, practically, to hold that the measure is the difference between the market value of the land before and after the injury, which, as we have before seen, and have recently decided,[1] is not the true measure in litigations between private parties. In the ordinary actions of trespass upon land the measure is the amount of the injury actually done to the plaintiff's land, and we see no reason to depart from that rule in this case. As there was no cutting or loss of timber, and no removal of any mineral, and as there is no liability for injury to buildings or fences, it would seem that the only element of damage is the loss of the soil. We do not, however, prejudge that question. If there were other elements of actual damage to the plaintiff's land they should be considered, but not, as we think, on the principle of allowing the difference in market value, either of the lot with the buildings, or without them, before and after the injury, or by determining its diminution in value."[2]

It is well settled that where the owner of a lot builds upon his boundary line, and the building is thrown down by reason of excavations made upon the adjoining lot, in the absence of

[1] Robb v. Carnegie, 145 Pa. 324, 22 Atl. Rep. 649, 27 Am. St. 694, 14 L. R. A. 329.

[2] McGettigan v. Potts, 149 Pa. 155, 24 Atl. Rep. 198.

improper motive and carelessness[1] in the execution of the work, no recovery can be had for such injury,[2] at least in excess of that which the plaintiff would have been entitled to if the land had not been built upon.[3] This is upon the assumption that the land slides or subsides by reason of the buildings upon it. If the damage done to buildings is not the result of their weight upon the land, then it may be considered in estimating the damages done by the removal of the lateral support.[4] Though the adjacent owner is not obliged to refrain from excavating near his line, except to preserve the lateral support of the adjoining land in its natural condition, still, if there are buildings upon the latter, he is bound to proceed with care for their protection, and must give reasonable notice of his intended excavation to the owner and also make the excavation with care.[5]

[1] "Negligence or want of due care in withdrawing lateral support in excavating or mining on adjoining land, for which there is liability for injury to a neighbor's buildings, means positive negligence or manifest want of due care in the excavations or mining so far as they affect, or are liable to affect, adjoining improvements." Matulys v. Philadelphia & R. Coal & Iron Co., 201 Pa. 70, 50 Atl. Rep. 823.

[2] McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Matulys v. Philadelphia & R. Coal & Iron Co., 201 Pa. 70, 50 Atl. Rep. 823; Gayford v. Nicholls, 9 Ex. 702; Humphries v. Brogden, 12 Q. B. 739; Partridge v. Scott, 3 M. & W. 220; Panton v. Holland, 17 Johns. 92, 8 Am. Dec. 369; Wyatt v. Harrison, 3 B. & Ad. 871; Brown v. Windsor, 1 Cromp. & J. 29; Moellering v. Evans, 121 Ind. 195, 22 N. E. Rep. 989; Moody v. McClelland, 39 Ala. 45, 84 Am. Dec. 770; Beard v. Murphy, 37 Vt. 693; Charless v. Rankin, 22 Mo. 566; Winn v. Abeles, 35 Kan. 85, 57 Am. Rep. 138; Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; McGettigan v. Potts, 149 Pa. 155, 24 Atl. Rep. 198; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

[3] Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 498, 49 N. E. Rep. 296.

[4] Brown v. Robins, 4 Hurl. & N. 186; Stroyan v. Knowles, 6 id. 454; Stearns v. Richmond, 88 Va. 992, 14 S. E. Rep. 847, 29 Am. St. 758. See Parke v. Seattle, 5 Wash. 1, 31 Pac. Rep. 310, 32 id. 82, 34 Am. St. 839, 20 L. R. A. 68.

[5] Harris v. Ryding, 5 M. & W. 60; Cooley on Torts, 595; Wyrley Canal Co. v. Bradley, 7 East, 368; Noonan v. Pardee, 200 Pa. 474, 50 Atl. Rep. 255, 86 Am. St. 722, 55 L. R. A. 410; Shrieve v. Stokes, 8 B. Mon. 453, 48 Am. Dec. 401; Moellering v. Evans, 121 Ind. 195, 22 N. E. Rep. 989, 6 L. R. A. 449; Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 498, 49 N. E. Rep. 296.

The duty of the person who makes an excavation adjoining the land of another to use due care in doing so extends to everything connected therewith. Where the defendant removed the earth from the wall of an adjoining building in such manner that the earth removed sloped up to the street, and allowed bricks placed in the street and gutter to remain therein, thereby causing the water

Failing to observe proper care in making the excavation, the damages recoverable include the injury to the buildings as well as the soil, and are to be estimated by the diminished value of the property, and not by the cost of replacing it.[1] The rule that the right to lateral support between adjoining owners does not include the right to the support of an artificial structure has no application when that structure abuts on a highway.[2] One who interferes with that support will be compelled, in an action for an injunction to restrain further excavation, to restore the highway.[3]

Owners of the surface are entitled to absolute subjacent support; they have a right to the support of their land with any erections thereon,[4] and may recover to the extent of their actual loss, including the value of buildings on the land.[5] If the owner of improvements is not chargeable with negligence in making them, and they are injured through the want of due care, he may recover their value, although the lot upon which they stood did not abut upon the land on which the excavation was made.[6] Where there is gross negligence merely the removal of lateral support to land designed for a burial place, and upon which trees have been set out, does not give a right to recover for injured feelings.[7]

§ **1054. Interference with business.** The interruption or impairment of an established business is an element of damage which may be proved as a distinct injury[8] or as bearing [419] upon the inquiry how much the value of the plaintiff's use of the premises affected has been lessened by the defendant's wrong-doing. If a stream is fouled the damages must be assessed with respect to the improvements made for ordi-

from a heavy rain to flow from the street into the excavation, whereby such wall was injured, he was, according to a majority of the court, liable for the injury. Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. Rep. 296.

[1] Ulrick v. Dakota Loan & Trust Co., 2 S. D. 285, 49 N. W. Rep. 1054.

[2] Milburn v. Fowler, 27 Hun, 568.

[3] Finegan v. Eckerson, 26 N.Y. Misc. 574, 57 N. Y. Supp. 605.

[4] Noonan v. Pardee, *supra*.

[5] Hext v. Gill, L. R. 7 Ch. App. 699; Bononi v. Backhouse, El., B. & E. 622, 9 H. of L. Cas. 503; Smith v. Thackerah, L. R. 1 C. P. 564; Cooley on Torts, 595.

[6] Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421.

[7] White v. Dresser, 135 Mass. 156, 46 Am. Rep. 454.

[8] Syracuse Solar Salt Co. v. Rome, etc. R. Co., 43 App. Div. 203, 60 N. Y. Supp. 40. affirmed without opinion, 168 N. Y. 650.

nary and useful purposes in connection with it.[1] The nature and extent of the business interfered with and its past productiveness may be proved, not with a view to measure the damages by expected profits prevented by the nuisance, but to assist the jury in the exercise of their judgment with a view to awarding adequate compensation.[2] It is established in England that where there is an unlawful obstruction of the right of access to a highway, whereby customers are prevented from entering a place of business, lost profits may be recovered.[3] This rule is favored in Georgia and Minnesota.[4] For obstructing the water below a mill by means of a dam so as to prevent its running, it has been held in New York that the owner and occupier of the mill is only entitled to recover the value of its use during the time he is necessarily deprived thereof and the amount of the permanent diminution of value by the erection of the dam. It was intimated that damage from the deterioration or fall in the market price of saw-logs on hand to be sawed, suffered without negligence of the plaintiff in omitting to make other disposition of them, should be disallowed as being analogous to unearned and contingent profits.[5] It is believed that this intimation is not supported by the supposed analogy because the loss in question is not a loss of profits; and upon the cases truly analogous such loss should be compensated.[6] If a boat is injured by an obstruc-

[1] Sanderson v. Pennsylvania Coal Co., 102 Pa. 370.

[2] Simmons v. Brown, 5 R. I. 229; Pollitt v. Long, 58 Barb. 20; White v. Moseley, 8 Pick. 356; Bucknam v. Nash, 12 Me. 474; St. John v. Mayor, etc., 6 Duer, 315, 13 How. Pr. 527; Park v. C. & S. W. R. Co., 43 Iowa, 636 (this case has often been cited in Iowa. See Dairy v. Iowa Central R. Co., 113 Iowa, 716, 84 N. W. Rep. 688); Shafer v. Wilson, 44 Md. 268; Stetson v. Faxon, 19 Pick. 147; Bonner v. Welborn, 7 Ga. 296; St. Louis, etc. R. Co. v. Capps, 67 Ill. 607; Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. Rep. 686; French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. Rep. 113; East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. Rep. 631.

[3] Rose v. Graves, 5 Man. & G. 613; Lyon v. Fishmongers' Co., 1 App. Cas. 662; Fritz v. Hobson, 14 Ch. Div. 542; Madigan v. Wellington & M. R. Co., 2 N. Z. L. R. 209 (Sup. Ct.); Benjamin v. Storr, L. R. 9 C. P. 400, 407.

[4] Brunswick & W. R. Co. v. Hardey, 112 Ga. 604, 37 S. E. Rep. 888; Harvey v. Georgia, etc. R. Co., 90 Ga. 66, 15 S. E. Rep. 783; Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. Rep. 221.

[5] Walrath v. Redfield, 11 Barb. 368, 18 N. Y. 457.

[6] Plummer v. Penobscot Lumber Ass'n, 67 Me. 363; Ward v. New York, etc. R. Co., 47 N. Y. 29; Manville v. Western U. Tel. Co., 37 Iowa, 214, 18

tion in a navigable river her charter value during the time of detention may be recovered and also the cost of repairs made necessary.[1] Where the owner of a boat was compelled by an obstruction placed across a river to unload his cargo, he was entitled to recover for the value of the use of the boat for the time it was delayed, including reasonable wages paid to the crew; but he could not recover for damage to the cargo which he left exposed to the weather and which was injured thereby, nor the cost of loading and unloading it. It seems that if the plaintiff had procured other means of transporting the cargo the reasonable cost of doing so could have been recovered.[2]

A loss of rent for neglecting to keep privies and drains in repair has been recovered for,[3] and also a depreciation in the value of property resulting from a like cause though the nuisance had been discontinued.[4] Recovery has also been had as for a permanent injury for establishing a brothel on property adjoining tenements held for renting.[5] In such a case a fair means of arriving at the actual damage would be to ascertain the loss of rent and depreciation of the value of the property caused by the nuisance; that is, how much less the property would sell for on account of the existence of the nuisance and [420] what loss of rent has resulted from the same cause. But in ascertaining these facts all circumstances that would show a depreciation in value should be considered;[6] and the damage recovered must be the actual depreciation shown to be caused by the existence of the nuisance. Where property is changing in character, and what has been a good residence neighborhood is invaded by business establishments which destroy its quiet, it is a matter of common observation that it passes through a period in which it is neither good for business of the better class nor for residences; and drinking sa-

Am. Rep. 8; Shepard v. Milwaukee Gas Co., 15 Wis. 318, 82 Am. Dec. 679; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 345.

[1] Missouri River Packet Co. v. Hannibal, etc. R. Co., 79 Mo. 478, 493.

[2] Farmers' Co-op. Manuf. Co. v. Albermarle & R. R. Co., 117 N. C. 579, 590, 23 S. E. Rep. 43, 53 Am. St. 606, 29 L. R. A. 700.

[3] Jutte v. Hughes, 67 N. Y. 268

[4] Babb v. Curators of State University, 40 Mo. App. 173.

[5] Givens v. Van Studdiford, 4 Mo. App. 498, 86 Mo. 149, 159, 56 Am. Rep. 421; Besso v. Southworth, 71 Tex. 765, 10 S. W. Rep. 523, 10 Am. St. 814.

[6] Id.; Illinois, etc. R. Co. v. Grabill, 50 Ill. 241.

loons and other establishments, more or less objectionable or disreputable, settle down for a time in what were once the residences of wealty citizens. When a bawdy house is opened in such a neighborhood it may be very difficult to say how much any depreciation of value is attributable to that fact alone. But if it be shown that after the defendant's house was so occupied other disreputable houses sprang up in the neighborhood the mere fact that it may be impossible to say how much of the damage was occasioned by the nuisance on the defendant's premises and how much by the other brothels, will not bar a recovery.[1] If the injury complained of is to property the damages are to be ascertained by the diminution in its value for the purposes for which, during the continuance of the nuisance, the property was used or would have been used but for the wrong done or suffered.[2]

§ 1055. Mitigation of damages. Neither the right of action nor the amount of the recovery is affected by the abatement of a nuisance so far as damages were sustained prior thereto.[3] The fact that the plaintiff might have abated a nuisance caused by obstructing a ditch, but did not, it being necessary to go upon the defendant's land for that purpose, will not affect his right of action or the damages.[4] Where, however, the plaintiff has access to the nuisance or the means or opportunity of avoiding or mitigating the injury it causes it is his duty to abate it or to take the proper measures for preventing or lessening the damages therefrom.[5] Where this duty arises

[1] Givens v. Van Studdiford, *supra*. See § 1059.

[2] Clark v. Pennsylvania R. Co., 145 Pa. 438, 27 Am. St. 710, 22 Atl. Rep. 989; § 1047.

[3] Tuebner v. California Street R. Co., 66 Cal. 171, 4 Pac. Rep. 1162; Gleason v. Gary, 4 Conn. 418; Pierce v. Dart, 7 Cow. 609; Renwick v. Morris, 3 Hill, 621; People v. Albany, 11 Wend. 539; Gloystein v. Commonwealth, 17 Ky. L. Rep. 1187, 33 S. W. Rep. 824.

[4] Chicago, etc. R. Co. v. Carey, 90 Ill. 514; White v. Chapin, 102 Mass. 138; Walrath v. Redfield, 11 Barb. 368; Heaney v. Heeney, 2 Denio, 625; Fromm v. Ide, 68 Hun, 310, 23 N. Y. Supp. 56. See Gilbert v. Kennedy, 22 Mich. 133.

A plaintiff is not bound to remove obstructions in a navigable river which cause him special injury. French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. Rep. 113.

[5] Chase v. New York, etc. R. Co., 24 Barb. 273; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. Rep. 878; Slavin v. State, 152 N. Y. 45, 46 N. E. Rep. 321; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 672, 59 N. W. Rep. 925, 43 Am. St. 711; Mayor v. Dannenberg, 113

[421] damages will be limited to such as are or would be suffered if it had been performed, added to the expense incident to the performance of it.[1] What might have been realized by one whose crop has been destroyed if he had replanted the land is too uncertain to be made the subject of proof in mitigation.[2] If the plaintiff, having the opportunity, without incurring a liability for trespass, neglects to exercise ordinary care and diligence to prevent injury he may be denied any recovery on the ground of contributory negligence.[3] He is not obliged, however, to take notice of the defendant's threat to commit a wrong and thereupon to take such measures; it is sufficient for him if he exercises ordinary care in the preservation of his property after he has knowledge that wrong has

Ga. 1111, 39 S. E. Rep. 446. *Contra*, Jarvis v. St. Louis, etc. R. Co., 26 Mo. App. 253; Paddock v. Somes, 102 Mo. 226, 14 S. W. Rep. 746, 10 L. R. A. 254.

In McCarty v. Boise City Canal Co., 2 Idaho, 226, 10 Pac. Rep. 623, the action was to recover damages to the plaintiff's land caused by leakage from the defendant's irrigating ditch, the defect in which the defendant knew of, and which it permitted to continue for more than a year. There was no error in refusing to permit him to show that the plaintiff might have prevented the injury to his land by incurring small expense. The court understood the rule to be that, where one person suffers injury by the carelessness of another, occurring unexpectedly and in a transitory manner, the one so suffering must go to some trouble to avoid or lessen the damage if a temporary expedient or slight expense will do so; but if one whose carelessness or negligence causes a continuing injury to another, having knowledge of the evil and the cause of it, deliberately stands by, having an equal opportunity to prevent the damage as the one suffering it, and permits it to continue without an attempt to prevent it, he cannot avoid his responsibility by showing that the one injured might have avoided the damage by a slight expense. Reference is made to Kerwhacker v. Cleveland, etc. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Richmond & D. R. Co. v. Anderson's Adm'r, 31 Gratt. 812, 31 Am. Rep. 750; Same v. Medley, 75 Va. 499, 40 Am. Rep. 734; Fraler v. Sears Union Water Co., 12 Cal. 555; Snyder v. P., C. & St. L. R. Co., 11 W. Va. 14, 37; Railroad Co. v. Jones, 95 U. S. 439; Gould v. McKenna, 86 Pa. 297, 27 Am. Rep. 705.

[1] Emery v. Lowell, 109 Mass. 197; Fowle v. New Haven & N. Co., 112 Mass. 334, 17 Am. Rep. 106; O'Riley v. McChesney, 3 Lans. 278; Terry v. Mayor, 8 Bosw. 504.

[2] G., C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

[3] Simpson v. Keokuk, 34 Iowa, 568; Van Pelt v. Davenport, 42 Iowa, 308; Irwin v. Sprigg, 6 Gill, 200, 46 Am. Dec. 667; Standard Oil Co. v. Kinnaird, 13 Ky. L. Rep. 269 (Ky. Super. Ct.). *Contra*, Jarvis v. St. Louis, etc. R. Co., 26 Mo. App. 253; Paddock v. Somes, 102 Mo. 226, 14 S. W. Rep. 746, 10 L. R. A. 254.

been done.[1] It is no defense that the plaintiff is a lessee and rented the premises injured after the business causing the nuisance had been established, with knowledge of its existence, and for a small rent on that account;[2] nor that the business is necessary to be carried on, and is useful to the public.[3] The operation and effect of natural agencies are presumed to be contemplated by a wrong-doer, and he cannot avoid or mitigate his liability because the injury done has been increased thereby.[4] Hence, where an obstruction in a navigable stream delays the rafting of logs when high water usually occurs, the increased expense of rafting them during a season of low water may be recovered.[5] Keeping a nuisance similar to that complained of does not defeat a recovery.[6] Where water is polluted the person who is entitled to have it flow naturally over his own property may decline the use of any other water. "We cannot see how such evidence could be used in mitigation of damages for infringement of an undisputed right. No wrong-doer can trespass on the right of a citizen and mitigate his wrong by saying, 'You can secure as valuable a right elsewhere.'"[7]

§ 1056. Same subject; deduction for benefits. If some incidental advantage accrues to the plaintiff from the act of the defendant which causes the nuisance that circumstance may be considered in mitigation.[8] In an action for damages occasioned by the filling up by the defendant of his land, adjacent to that of the plaintiff, whereby the free flow of water off the latter's land had been prevented, the jury were held properly instructed that they should take into consideration the

[1] Plummer v. Penobscot Lumber Ass'n, 67 Me. 363.

[2] Smith v. Phillips, 8 Phila. 10; Central R. v. English, 73 Ga. 366; Mississippi & T. R. Co. v. Archibald, 67 Miss. 38, 7 So. Rep. 212.

[3] Smith v. Phillips, 8 Phila. 10; Shirely v. Cedar Rapids, etc. R. Co., 74 Iowa, 169, 37 N. W. Rep. 133, 4 Am. St. 471; Marcy v. Fries, 18 Kan. 353. Compare Dunsmore v. Central Iowa R. Co., 72 Iowa, 182, 33 N. W. Rep. 456.

[4] Mississippi & T. R. Co. v. Archibald, 67 Miss. 38, 7 So. Rep. 212; Brink v. Kansas City, etc. R. Co., 17 Mo. App. 177, 199; Bird v. Hannibal, etc. R. Co., 30 id. 365.

[5] Gates v. Northern Pacific R. Co., 64 Wis. 64, 24 N. W. Rep. 494.

[6] Randolf v. Bloomfield, 77 Iowa, 50, 41 N. W. Rep. 562, 14 Am. St. 268.

[7] Stevenson v. Ebervale Coal Co., 203 Pa. 316, 331, 52 Atl. Rep. 201, 201 Pa. 112, 50 Atl. Rep. 818.

[8] Hicks v. Drew, 117 Cal. 305, 314, 49 Pac. Rep. 189, citing this section.

evidence on both sides bearing on this point, and if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular they should make an allowance for such benefit, and give the plaintiff such sum in damages as they found would fully indemnify and compensate him for all the damages actually sustained.[1] The authorities of the city in which the plaintiff's premises were situated gave [422] a railroad company the right to locate and operate their road on the street in front of those premises on condition that they should macadamize certain neighboring streets and construct a sewer; these improvements were made. In an action for damages to the plaintiff for occupying the street in front of his premises without extinguishing his right therein as a highway, the company were entitled to show in diminution that the work so done enhanced the value of his property.[2] The benefit occasioned to a meadow below a mill-dam by a ditch dug at the time of the erection of the dam by its owner through his own land below the meadow cannot be set off against the damage done the meadow by subsequent flowing occasioned by the dam; and the cost of the ditch is immaterial in assessing such damages.[3]

In New Hampshire it has been held that the damage caused in washing away the bank of a stream, flowing land and depreciating the grass thereon by a mill-owner accumulating water in the wet season and letting it off in the summer, cannot be mitigated by any benefit that such flowing makes on any other part of the same proprietor's land.[4] The case so holding is approved in New Jersey, under circumstances indicated by the following excerpt from the opinion of the court of errors

[1] Luther v. Winnisimmet Co., 9 Cush. 171; Brower v. Merrill, 3 Pin. 46.

So far as water diverted from a stream is returned thereto the damages sustained by a lower proprietor are mitigated. Mannville Co. v. Worcester, 138 Mass. 89, 52 Am. Rep. 261.

[2] Porter v. North Missouri R. Co., 33 Mo. 128.

In Palmer Co. v. Ferrill, 17 Pick. 58, it was held that in assessing damages under the statute for flowing lands the proper rule was to estimate the loss arising to the proprietor from the direct injury done to the land, taken as a whole, by the flowing, deducting therefrom any benefit which may be done to the same land by the same cause, namely, by the flowing.

[3] Gile v. Stevens, 13 Gray, 146.

[4] Gerrish v. New Market Manuf. Co., 30 N. H. 478; Talbot v. Whipple, 7 Gray, 122.

and appeals: It is the right of every owner of land upon a stream to have the water come to him in its natural flow, undiminished in quantity and unimpaired in quality, and, it may be added, with no increase of the volume except from natural causes. Therefore, it is an actionable nuisance at common law for a mill owner or other person to turn a new stream into the stream or, by means of a reservoir, to increase the volume of water naturally flowing in the stream. It is no defense to an action for such an injury that the person complaining is benefited by the increase in the volume of water, for no person can be compelled to have his premises improved, and has a right to their enjoyment in their natural condition and according to his tastes and inclination.[1] A party liable for conducting a tannery and other offensive business, where they constitute a nuisance to the owner of houses for rent, is not entitled to show in mitigation of damages that since his tannery has been operated it has enhanced the value of the plaintiff's premises and the rental thereof, in consequence of the number of persons employed therein creating a demand for dwellings in the vicinity.[2] If damages for permanent depreciation in value are recovered, special benefits resulting to the property are doubtless to be estimated.[3] If benefit results to property from the grading of a street or other public improvement and the work is done with reasonable skill, the damages recoverable are thereby diminished.[4] But if, as the result of negligence or unskilfulness in doing the work, damage ensues, the benefits resulting cannot affect the damages.[5]

To entitle the defendant to show any incidental benefit to the plaintiff it must accrue directly from the act or business which causes or constitutes the nuisance and confer the benefit in the same manner as it operates to produce the in- [423] jury; the allowance for benefits must be confined to the proximate consequences of the act complained of and be effects of

[1] East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 207, 38 Atl. Rep. 631.

[2] Francis v. Schoellkopf, 53 N. Y. 153.

[3] Chicago Forge & B. Co. v. Major, 30 Ill. App. 276; Same v. Sanche, 35 id. 174.

[4] Schroeder v. Joliet, 189 Ill. 48, 59 N. E. Rep. 550; Hurt v. Atlanta, 100 Ga. 274, 28 S. E. Rep. 65.

The distinction between the rule applicable in such cases and in cases between individuals is indicated in Farkas v. Towns, 103 Ga. 150, 156, 29 S. E. Rep. 700, 68 Am. St. 88.

[5] Atlanta v. Word, 78 Ga. 276.

like kind with the opposite injuries for which the recovery is sought.[1] In a recent Georgia case[2] the defendant diverted water and caused it to flow upon and injure adjacent land and a building thereon. He sought to show that the market value of the property was increased by the act which caused the damage. The court said: If by his wrongful act the defendant caused a diminution in the market value of the plaintiffs' lot, they would be entitled to compensation from him for the loss which they sustained. In reply to evidence supporting a claim of this character, the defendant would have the right to show that the market value, in consequence of the act complained of, had in fact been increased. Proof of increase in market value would give the defendant no right to recoup against the plaintiffs for the amount of such increase, but would simply show that there had been no decrease in market value, and, therefore, the plaintiffs were not entitled to recover on that account. But an increase in market value could not be set off against any compensation to which the plaintiffs were entitled for actual physical injuries to their lot and the building thereon, nor could it be set off against damages which they sustained by reason of a diminution of the value of their property for use. A wrong-doer cannot escape liability for the destruction of his neighbor's house by showing that, in consequence of the act which caused its destruction, the lot upon which the house stood is worth more than it was before the house was destroyed. His neighbor was entitled to possess, use and enjoy both his house and his lot in their existing conditions, and cannot, after the destruction of the former, be compelled to sell the lot or to devote it to a different use in order to obtain compensation for the loss which he has sustained.[3] Nor could such wrong-doer escape liability for any diminution in the value of the premises for use by showing that the market value of the property had been increased. It had been decided in an earlier case in Georgia[4] in which a railroad

[1] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667.

[2] Farkas v. Towns, 103 Ga. 150, 154, 28 S. E. Rep. 65, 68 Am. St. 88.

[3] Davis v. East Tennessee, etc. R. Co., 87 Ga. 605, 612, 13 S. E. Rep. 567; Gerrish v. New Market Manuf. Co., 30 N. H. 478; Marcy v. Fries, 18 Kan. 353; Francis v. Schoellkopf, 53 N. Y. 153.

[4] Harvey v. Georgia, etc. R. Co., 90 Ga. 66, 15 S. E. Rep. 783.

company which had illegally obstructed a street and thereby prevented the plaintiff's customers from going to his place of business, that it was not a defense that new and increased custom will result to the plaintiff's business by reason of the obstruction itself, as by placing a depot across the alley; it was also ruled that an increase in the value of his property could not be considered as a set-off against the injury to the business.

It has been held in Massachusetts that tenants who have continued in the occupancy of premises, diminished in value by a nuisance, in consideration of reduced rents given by the landlord, cannot maintain an action to recover for the decreased value of the premises to them.[1] This view has been approved by the New York court of appeals.[2] There are forcible objections to this view, which are well expressed by Dixon, J., in a recent case.[3] The adjustment of the rent is not a satisfaction of the damages suffered by the tenant from the defendant's wrong. "By the letting the tenants acquired the right to the enjoyment of the property unimpaired by any wrongful acts of the defendant. That, through fear of such acts, they had been enabled to obtain that right at a diminished price, neither licensed the acts nor relieved the defendant in any degree from the duty of reparation. The measure of the tenants' damages did not depend upon the amount of rent which they paid, but upon the diminution in the value of the use of the premises resulting from the wrongful diversion of water. The landlords in leasing to the tenants at reduced rates were not to be regarded as agents of the defendant adjusting with the tenants the compensation for the injury to be done. Both landlords and tenants were acting independently of the defendant, and not in any sense detracting from the rights which they then had or thereafter might acquire against the defendant. Notwithstanding their acts, the wrong-doer remained answerable to the landlords for lessening the value of the reversion, and to the tenants for lessening the value of the use during the term." The deduction in the rent was of course set off against the tenants' damages.[4]

[1] Baker v. Sanderson, 3 Pick. 348.
[2] See § 1057.
[3] Halsey v. Lehigh Valley R. Co., 45 N. J. L. 26, 37.
[4] Id.

§ 1057. Damages affected by interest in estate. The damages recoverable against the party responsible for a nuisance will be limited to the title or right of the plaintiff as in trespass.[1] Where a husband and wife joined in an action on the case for permanently obstructing a right of way appurtenant to her inheritance, and she died while it was pending, the suit did not abate; the surviving husband recovered the whole amount of damages sustained until the death of the wife, and of those accruing afterwards a proportion equal to his interest in her estate as heir.[2] A reversioner can only sue in respect of permanent injury which will continue to affect the property when his interest comes into possession; but the remoteness of the time when the possession may revert is not a bar to an action if the nuisance is permanent.[3] It has been ruled that when the land damaged is held for the purpose of letting it on building leases and selling the ground rent, any depreciation in the value of such rent is not a cause of damage to the reversioner because that is not the natural way of dealing with a reversion.[4] Where the reversioner had contracted to lease land to builders and to make, and had made them, advances, and sought to recover for the depreciation in his securities resulting from an injury done to the buildings, it was held that the builders' right to leases depended upon their payment of whatever advances had been made, and the reversioner's recovery was determinable by the sum necessary to repair the injury directly caused by the nuisance, and by ascertaining how far the houses before they were repaired would have been a sufficient security for the advances. If there was a deficiency he was entitled to so much of the sum required to pay the damage done the houses as, in addition to their value in their injured state, would have been sufficient to make good the advances.[5] Damages were allowed for delay in letting vacant land which had been overflowed.[6]

[1] Bentley v. Atlanta, 92 Ga. 623, 18 S. E. Rep. 1013; Hufnagel v. Mt. Vernon, 49 Hun, 286, 1 N. Y. Supp. 787; Francis v. Schoellkopf, 53 N. Y. 153; Seely v. Alden, 61 Pa. 305, 100 Am. Dec. 642; Staple v. Spring, 10 Mass. 72. See §§ 1012, 1013.

[2] Jeffcoat v. Knotts, 11 Rich. 649.

[3] Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch. 287.

[4] Rust v. Victoria Graving Dock Co., 36 Ch. Div. 113, 131.

[5] Id.

[6] Id.

It has been held by one of the intermediate Missouri courts that the right of a tenant to sue for the damages caused by overflowing his crops is not affected by the fact that he rented the land after the erection of the embankment which caused the injury, and with knowledge that it was standing. If he is not prevented from cultivating the land his recovery is limited to the injury done his crop.[1] A case in New York is hardly harmonizable with this view, and, though it was affirmed by the court of appeals, is not to be regarded as sound in view of a later decision next referred to, unless it can be distinguished as is indicated therein. The plaintiff was aware of the existence of the nuisance when he became a tenant, and might have ascertained that the stream of which he complained had been polluted by the defendant's sewage for many years, that it had been judicially declared to be a public nuisance, and that it could not be abated for some time. Under these circumstances it was presumed that the rent was based on the existing conditions, and hence the tenant was not damaged.[2] But in the case referred to it is held that a tenant who renews his lease knowing that a nuisance exists on the premises may recover damages sustained during the renewal period. The reason of the rule is thus tersely given: If the act complained of is a nuisance, it is a wrong, the existence of which cannot be justified at any time as against any one injuriously affected thereby.[3] Under some circumstances the owner, though not in possession, may recover all the damage done by a nuisance — as where, in consequence of it, he has given his tenants a reduction of rent at their request in consideration of their continuing as tenants. "After such an agreement they could not maintain an action against the defendant for damages occasioned by the obstructions complained of. That agreement and the plaintiff's recovery in this case will be a good bar to any action that may be brought in the names of the tenants."[4]

[1] McKee v. St. Louis, etc. R. Co., 49 Mo. App. 174.

[2] Yoos v. Rochester, 92 Hun, 481, 36 N. Y. Supp. 1072, affirmed without opinion, 159 N. Y. 541.

[3] Bly v. Edison Electric Illuminating Co., 172 N. Y. 1, 58 L. R. A. 500, 64 N. E. Rep. 745; Smith v. Phillips, 8 Phila. 10, and other cases cited in the opinion in the principal case.

[4] Baker v. Sanderson, 3 Pick. 352; Sumner v. Tileston, 7 id. 198. It is said in Bly v. Edison Co., *supra*, that Yoos v. Rochester, *supra*, falls in this category. See Van Siclen v. City of New York, 64 App. Div. 437, 72 N. Y.

§ 1058. Private remedy for public nuisance. A nuisance may be both public and private in its character; in so far as it is public the person who suffers a peculiar damage therefrom has a right of action.[1] There are three things which one who sues on account of a public nuisance must show, in addition to the existence thereof, before he can recover. 1. A particular, or, more exactly speaking, a peculiar, injury to himself beyond that which is suffered by the rest of the public. 2. The injury to him must, according to some courts, be direct, and not merely consequential. 3. It must be of a substantial character, not fleeting or evanescent.[2] Justice Fry has observed of the expression "fleeting or evanescent" that that is not deemed to be so which results in substantial damage; the language has not so much reference to time as to the effects upon the plaintiff.[3] One who has sustained damage peculiar to himself from a common nuisance has a cause of action against the person creating or maintaining it, although a like injury has been sustained by numerous other persons.[4] Gro-

Supp. 209, as modified in 172 N. Y. 504, 65 N. E. Rep. 257. See, also, last paragraph of § 1056.

[1] Park v. C. & S. W. R. Co., 43 Iowa, 636; Crommelin v. Coxe, 30 Ala. 318, 68 Am. Dec. 120; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160; Myers v. Malcolm, 6 Hill, 292; Hay v. Cohoes Co., 3 Barb. 48; Fort Plain Bridge Co. v. Smith, 30 N. Y. 62; Welton v. Martin, 7 Mo. 307; Grigsby v. Clear Lake Water Co., 40 Cal. 396; Venard v. Cross, 8 Kan. 248; Clark v. Peckham, 10 R. I. 35, 14 Am. Rep. 654; Greene v. Nunnemacher, 36 Wis. 50; Ford v. Santa Cruz R. Co., 59 Cal. 290; Holmes v. Corthell, 80 Me. 31, 12 Atl. Rep. 730; French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. Rep. 113; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. Rep. 878, 48 Ill. App. 247; Crane Co. v. Stammers, 83 Ill. App. 329; Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. Rep. 1000; Schoen v. Kansas City, 65 Mo. App. 134; Buckholz v. New York, etc. R. Co., 148 N. Y. 640, 43 N. E. Rep. 76; Potter v. Indiana, etc. R. Co., 95 Mich. 389, 54 N. W. Rep. 956; Page v. Mille Lacs Lumber Co., 53 Minn. 492, 52 N. W. Rep. 608, overruling Swanson v. Mississippi & Rum River Boom Co., 42 Minn. 532, 44 N. W. Rep. 986, 7 L. R. A. 673, and Lammers v. Brennan, 46 Minn. 209, 48 N. W. Rep. 766; Knowles v. Pennsylvania R. Co., 175 Pa. 623, 34 Atl. Rep. 974, 52 Am. St. 860; Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. Rep. 646.

[2] Per Lord Justice Brett in Benjamin v. Storr, L. R. 9 C. P. 406, except as to the qualification in the second proposition.

[3] Fritz v. Hobson, 14 Ch. Div. 542, 556.

[4] Francis v. Schoellkopf, 53 N. Y. 153; Bannon v. Rohmeiser, 17 Ky. L. Rep. 1738, 34 S. W. Rep. 1084; Farmers' Co-op. Manuf. Co. v. Albermarle & R. R. Co., 117 N. C. 579, 23 S. E. Rep. 43, 53 Am. St. 606, 29 L. R. A. 700; Indianapolis Water Co. v.

ver, J., thus forcibly states this doctrine: "The idea that if by a wrongful act a serious injury is inflicted upon a single individual recovery may be had therefor against the wrong-doer, and that if by the same act numbers are so injured no recovery can be had by any one, is absurd. . . . It is said that holding the defendant liable to respond in an action to each one injured will lead to a multiplicity of actions. This is [424] true, but it is no defense to the wrong-doer when called upon to compensate for the damages sustained from his wrongful act to show that he, by the same act, inflicted a like injury upon numerous other persons. The position is unsustained by any authority.[1] While in the application to particular cases there is some conflict,[2] yet there is none whatever in the rule itself. That rule is that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom except such as is common to the entire community; yet he is liable at the suit of one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury. When the injury is common to the public, and special to none, redress must be sought by a criminal prosecution in behalf of all."[3] The plaintiff must suffer some special damage beyond that which is suffered in common with the public.[4]

American Strawboard Co., 57 Fed. Rep. 1000.

[1] Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. Rep. 82.

[2] See Stetson v. Faxon, 19 Pick. 147; Farrelly v. Cincinnati, 2 Disney, 516; Page v. Mille Lacs Lumber Co., 53 Minn. 492, 52 N. W. Rep. 608, and local cases referred to in the opinion; South Carolina Steamboat Co. v. Wilmington, etc. R. Co., 46 S. C. 327, 24 S. E. Rep. 337, 33 L. R. A. 541; Dudley v. Kennedy, 63 Me. 465.

[3] Cases cited in note 4, p. 3088, *supra;* Lansing v. Smith, 4 Wend. 9, 21 Am. Dec. 89; Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160; First Baptist Church v. Schenectady, etc. R. Co., 5 Barb. 83. See Shawbut v. St. Paul, etc. R. Co., 21 Minn. 502.

[4] Dudley v. Kennedy, 63 Me. 465; Yolo County v. Sacramento, 36 Cal. 193; Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634; Cole v. Sprowl, 35 Me. 161, 56 Am. Dec. 696; Harrison v. Sterett, 4 Har. & McH. 540; Bunyon v. Bordine, 14 N. J. L. 472; Baxter v. Wynoski Turnpike Co., 22 Vt. 114; Hatch v. Vermont, etc. R. Co., 28 Vt. 142; Brown v. Watson, 47 Me. 161, 74 Am. Dec. 482; Marini v. Graham, 67 Cal. 130, 7 Pac. Rep. 442; McCloskey v. Kreling, 76 Cal. 511, 18 Pac. Rep. 433; Hogan v. Central Pacific R. Co., 71 Cal. 83, 11 Pac. Rep. 876; Gilbert v. Greeley, etc. R. Co., 13 Colo. 501, 22 Pac. Rep. 814.

This may be direct or consequential,[1] and must be specially alleged.[2]

§ 1059. Joint and several liability. All persons who jointly participate in the creation of a nuisance or in its maintenance during the same period may be held liable jointly or severally as in other cases of tort.[3] But parties liable only as tenants or grantees of the premises on which a nuisance is situated cannot be held jointly liable with the party creating it; for, while the creator of a nuisance continues to be liable in the tenant's or grantee's time, the latter are not liable before their connection with the property. And in case of a succes- [425] sion of tenants each is severally liable during his term only; and successive grantees in the same manner.[4] One who purchases premises with a nuisance upon them, they being subject to a demise for a term, so that he is without opportunity for abating the nuisance, does not make himself liable for it.[5]

If several, independently and without concert, create a nuisance they are not jointly liable; but each is liable in respect to his own wrongful act, and for the damages which resulted therefrom.[6] A dam was filled by deposits of coal dirt from different mines on the stream above the dam; some mines were worked by the defendants and their tenants, and others by persons entirely unconnected with the defendants. The court held that the latter were not liable for the combined results of all the deposits; that the ground of the action was

[1] Rose v. Miles, 4 M. & S. 101; De Laney v. Blizzard, 7 Hun, 7; Goggans v. Myrick, 131 Ala. 286, 292, 31 So. Rep. 22.

[2] Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 241; Memphis, etc. R. Co. v. Hicks, 5 Sneed, 427.

[3] Chicago-Virden Coal Co. v. Wilson, 67 Ill. App. 443; Kewanee v. Ladd, 68 id. 154; Hyde Park Thomson-Houston Light Co. v. Porter, 167 Ill. 276, 47 N. E. Rep. 206; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. Rep. 706; Stickley v. Chesapeake & O. R. Co., 93 Ky. 323, 20 S. W. Rep. 261; Moore v. Townsend, 76 Minn. 64, 78 N. W. Rep. 880; Cooley on Torts, 133, 134.

[4] Greene v. Nunnemacher, 36 Wis. 50; Lull v. Fox & W. Imp. Co., 19 Wis. 101; Hess v. Buffalo, etc. R. Co., 29 Barb. 391; Wayland v. St. Louis, etc. R. Co., 75 Mo. 548.

A grantee is not liable for the erection or continuance of a nuisance caused by his grantor on land not owned by the latter. Wayland v. R. Co., *supra;* § 1035.

[5] Williamson v. Friend, 1 N. S. W. St. Rep. (eq.), 133, disapproving a *dictum* of Littledale, J., in King v. Pedley, 1 Ad. & E. 822, 827.

[6] Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. Rep. 1000; Correll v. Cedar Rapids, 110 Iowa, 333, 31 N. W. Rep. 724.

not the deposit of the dirt in the dam by the stream, but the negligent act above; throwing the dirt into the stream was the tort; the deposit only the consequence. The liability of the defendants began with their acts on their own land, and was wholly separate and independent of concert with others. Their tort was several when committed, and it did not become joint because its consequences united with other consequences; and they were not liable for the acts of their tenants not done by their authority or command.[1] "It may be difficult to determine how much dirt came from each colliery, but the relative proportion thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held liable for the torts of others without concert. It would be simply to say because the plaintiff fails to prove the injury one man does him he may therefore recover from that one all the injury that the others do."[2] Where the owners of different tracts of land, acting separately, constructed and maintained different ditches, whereby waters were turned into a canon and then commingled and passed through it and overflowed the plaintiff's land, covering it with sand, they were not jointly liable for the damages.[3]

The defendant constructed a covered channel for a small brook that ran through his premises. The channel proved insufficient for all the water that came down the brook [426] in times of heavy rain, and by its obstruction caused water to overflow upon and injure the adjoining premises of the plaintiff. The local authorities, after making such channel, con-

[1] Little Schuylkill Navigation, etc., Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 209.

[2] Chipman v. Palmer, 9 Hun, 517; Wallace v. Drew, 59 Barb. 413; Van Steenburgh v. Tobias, 17 Wend. 562, 31 Am. Dec. 310; Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Vt. 9; Buddington v. Shearer, 20 Pick. 477; Auchmuty v. Ham, 1 Denio, 495; Partenheimer v. Van Order, 20 Barb. 479; Elgin v. Welch, 16 Ill. App. 483; Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. Rep. 172; Mansfield v. Hunt, 19 Ohio Ct. Ct. 488, 493, citing the text. But see Boyd v. Watt, 27 Ohio St. 259; Givens v. Van Studdiford, 4 Mo. App. 498.

[3] Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. 254.

structed several sewers and drains which emptied into the brook above these premises, by which a considerable quantity of sewage and surface water that would have gone in other directions was let into the brook. It was held that the defendant was not liable for any damage beyond that caused by the natural flow of the water, including its increased flow from heavy rains and other natural causes; that he and the city which constructed such sewers were not joint-feasors.[1] There may be a like limitation where the wrongful acts have produced consequences multiplied by unforeseen and extraordinary natural causes. A railway company threw the waste water from its tank upon the premises of another, where it spread and froze, doing damage to the property of the owner; it was held that the company could not claim exemption from liability on the ground that the freezing of the water was the act of nature, for such result from the wrongful act might have been foreseen. To excuse from liability for an act of nature in combination with the defendant's act it must have been such as could not have been foreseen or prevented by the exercise of ordinary care and prudence.[2] Where all the water which so freezes on another's lot is not the water turned thereon by the defendant, but a part is flowing surface water in its natural course, the defendant is liable only for the damages resulting from the water caused to flow upon the land by himself. The jury should not return nominal damages in such a case merely because they cannot determine how much of the actual damage was so caused. They must estimate in the best way they can how much of the whole damage was occasioned by the water turned on the land by the defendant.[3]

Joint and several liability may attach to persons who are not joint tort-feasors, as where their acts are separate and distinct as to place and time, but culminate in producing a public nuisance which injures the person or property of another.[4] In a New York case three persons owned in severalty adjoining lots. A continuous brick wall formed the front of the three

[1] Sellick v. Hall, 47 Conn. 260.

[2] Chicago, etc. R. Co. v. Hoag, 90 Ill. 339; Cobb v. Smith, 38 Wis. 21. See Ohio & M. R. Co. v. Combs, 43 Ill. App. 119.

[3] Chicago, etc. R. Co. v. Hoag, *supra;* Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872, 21 id. 11.

[4] Valparaiso v. Moffitt, 12 Ind. App. 250, 29 N. E. Rep. 909, 54 Am. St. 522.

buildings on the lots. The buildings were destroyed by fire, which left standing only the front wall and parts of the partition walls. Shortly after the fire the front wall began to incline toward the street and afterwards fell upon and killed a person lawfully there. The wall all fell and the material from it, situate on two of the lots, caused the injury, no part of that comprising the wall of the other lot having struck the deceased. In an action against all the lot owners they were held jointly and severally liable because their misconduct created a public nuisance.[1]

§ 1060. Pleading. The general allegation of damage will suffice to let in proof and warrant the recovery of all such damages as naturally and necessarily result from the wrongful act complained of; the law implies such damages; that is, [427] damages of that sort, and proof is necessary only to show their extent and amount.[2] But where the damages actually sustained do not necessarily result from the act complained of, and consequently are not implied, the plaintiff must state in his declaration the particular damage which he has sustained for notice thereof to the defendant; otherwise the plaintiff will not be permitted to give evidence of it on the trial.[3] The

[1] Simmons v. Everson, 124 N. Y. 319, 26 N. E. Rep. 911, 21 Am. St. 676. See South Bend Manuf. Co. v. Liphart, 12 Ind. App. 185, 39 N. E. Rep. 908, citing, besides local cases, Klauder v. McGrath, 35 Pa. 128.

[2] 1 Chitty Pl. 395; Solms v. Lias, 16 Abb. Pr. 311; Taylor v. Dustin, 43 N. H. 493; De Forest v. Leete, 16 Johns. 122; Bristol Manuf. Co. v. Gridley, 28 Conn. 201; Burrell v. New York & S. Solar Salt Co., 14 Mich. 39; Teagarden v. Hetfield, 11 Ind. 522; Ellicott v. Lamborne, 2 Md. 131; Gempp v. Bassham, 60 Ill. App. 84.

The deposit of earth and like substances is the natural result of the overflow of land by water, and the damage resulting may be recovered, although the items thereof were not specially pleaded. Hunt v. Iowa Central R. Co., 86 Iowa, 15, 52 N. W. Rep. 668, 41 Am. St. 473.

Under a declaration claiming for injuries to an entire original lot which was divided into sub-lots, damages to any part of the land may be recovered. Hetzel v. Baltimore & O. R. Co., 169 U. S. 26, 18 Sup. Ct. Rep. 255.

[3] Holmes v. Corthell, 80 Me. 31, 12 Atl. Rep. 730; Squier v. Gould, 14 Wend. 159; Plimpton v. Gardiner, 64 Me. 360; Taylor v. Dustin, 43 N. H. 498; Spencer v. St. Paul, etc. R. Co., 21 Minn. 362; Wampach v. Same, id. 364; Ellicott v. Lamborne, 2 Md. 131; § 39; Houston, etc. R. Co. v. Lackey, 12 Tex. Civ. App. 229, 33 S. W. Rep. 768.

If it is alleged that the nuisance has caused several distinct injuries the complaint is ambiguous and uncertain if it does not specify the amount of damage produced by each. Grandona v. Lovdal, 70 Cal. 161, 11 Pac. Rep. 623.

damages which enter into or constitute the general measure of recovery are those provable under the usual allegation of damage; but in many cases of tort there is no such state of facts that the whole injury would be covered by any general rule more precise than the elementary principle which entitles the injured party to just compensation. The question, therefore, whether any particular injurious result of the tortious act committed by the defendant, not stated in the pleadings, can still be proved to enhance the damages must depend on whether it is the necessary consequence of that act. If not the direct consequence it must be alleged, and so specifically as that the defendant may be apprised of the claim. Where the use of a mill was impaired by the obstruction of the water by a dam below on the stream, and the declaration alleged that the obstruction subjected the plaintiff to great loss and expense by the interruption of the business of the mill and in depriving him of the profits thereof, it was held he was not entitled to recover for the loss or diminution of rent. "Profits," say the court, "are clearly distinguishable from rents. Both terms are technical in their nature, and neither necessarily includes the other; there may be profits without rent, and *vice versa*."[1] In an action for obstructing a right of way leading to an estate held by the plaintiff's wife in mortgage [428] the declaration contained only the general allegation of damages; and it was held that those for the consequent diminution of rents could not be recovered because not specially alleged.[2] So in an action for obstructing a natural watercourse and thereby injuring the plaintiff's buildings, loss of rents was treated as special damages.[3] In an action for the pollution of the water of a stream which ran through the plaintiff's land he was not permitted to prove the cost of boiling and skimming the water to fit it for household purposes, in the absence of an allegation that the water was, and had to be, so treated.[4] It was also held that proof was inadmissible to show that the rental value of the farm was diminished by the wrong done in polluting the waters of such stream because

[1] Plimpton v. Gardiner, 64 Me. 360.
[2] Adams v. Barry, 10 Gray, 361.
[3] Parker v. Lowell, 11 Gray, 353; Healey v. Kelley, 21 R. I. 489, 44 Atl. Rep. 804.
[4] Porter v. Froment, 47 Cal. 165.

the complaint failed to allege that the plaintiff rented the farm or was prevented from renting it for that reason.[1]

The plaintiff, owner of a paper mill, set forth in his declaration as its *gravamen* that earth, sand and other substances were washed into his mill-dam and so filled and choked the dam as to make it in a great degree useless to him in the working of his mill. The court held that he could not offer evidence to prove that he could not wash his rags because the stream was rendered impure and muddy by the earth and clay deposit in and upon the margin, and that by reason of such impurity of the water he was prevented from making white paper. That the manufacture of paper is one thing and the preparation of the materials is another distinct process; and evidence showing damage as resulting from the interruption of the latter is not proper, unless the fact is expressly pleaded. That the fact that the plaintiff owned a paper mill operated by water from the dam in question did not necessarily suggest the additional fact that he made white paper in his mill, and that the rags for the same were washed from the water in the dam. His inability to wash his rags and make paper could not, therefore, be regarded as the necessary and inseparable consequence of the washing of the earth into and filling up of the dam, and he could not recover for [429] those particular injuries without specially alleging them.[2] But where the allegation was that the defendant failed to keep the privies, drains and drain pipes connected with his building in proper repair, but suffered the same to become and remain out of order so that water and filth escaped therefrom and percolated through the wall of the plaintiff's house on adjoining premises and into the cellar in such quantities as to soak and cover its floor and to make the same permanently unfit for use, and, also, to greatly injure the walls and other portions of the building, and to create such an offensive stench and smell as to interfere with the use of said premises and with the letting thereof, it was held that the allegations were sufficient to authorize evidence of the loss of the use of the cellars and of the rental thereof.[3]

[1] Porter v. Froment, 47 Cal. 165
[2] Ellicott v. Lamborne, 2 Md. 131.
[3] Jutte v. Hughes, 67 N. Y. 267.

CHAPTER XXVI.

TAKING PROPERTY FOR PUBLIC USE.

§ 1061. The power of eminent domain.
1062. Consequential injury to property not taken.
1063. What is just compensation.
1064. Measure of compensation.
1065. Injury to property not taken.
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1091. Interest.

[430] **§ 1061. The power of eminent domain.** By the exercise of the right or power of eminent domain an individual owner may be compelled to sell and surrender his property when the public necessities require it.[1] Not only land, but incorporeal rights connected therewith, may be taken for public use.[2] The taking is deemed to be for such use as well when the state or some municipal division thereof exercises the

[1] Fletcher v. Peck, 6 Cranch, 145; Trombley v. Humphrey, 23 Mich. 474, 9 Am. Rep. 94; San Francisco, etc. R. Co. v. Caldwell, 31 Cal. 367.

[2] Furniss v. Hudson River R. Co., 5 Sandf. 551; Ladd v. Boston, 151 Mass. 285, 24 N. E. Rep. 858; Lycoming Gas & W. Co. v. Moyer, 99 Pa. 615; Story v. New York E. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Newman v. Metropolitan E. R. Co., 118 N. Y. 618, 23 N. E. Rep. 901, 7 L. R. A. 289; Metropolitan, etc. R. Co. v. Springer, 171 Ill. 170, 49 N. E. Rep. 416; Leonard v. Rutland, 66 Vt. 105, 28 Atl. Rep. 885.

power as when it is invoked by certain private corporations in aid of their undertakings to subserve the public interest, as for railroads, canals and other improved means of travel, transportation or communication.[1] This right of eminent domain can be exercised to take private property only on the inseparable condition of making just compensation therefor,[2] which must be of a pecuniary nature,[3] and is secured by constitutional inhibition of the exercise of the right except upon its payment. Statutes which provide for the exercise of the right uni- [431] versally direct how the amount shall be ascertained and paid. Many statutes give a right to compensation for consequential injuries that are not within the requirement to make just compensation;[4] for the legislature may authorize the exercise of the right of eminent domain without providing for all consequential damage. In the past few years there has been an extension of the liability for such damage. Nearly all the new and revised constitutions require that compensation shall be made for property "injured," "damaged" or "destroyed," as well as for that "taken."[5] The imposition of that liability by constitution or statute creates no new right, but preserves the common-law right to recover in respect of any injury resulting from the enterprise, although that enterprise which is the cause of the injury has the sanction of law.[6]

The land-owner cannot be deprived of the compensation secured by the constitution or by statute, except by his own act

[1] Buffalo, etc. R. Co. v. Brainard, 9 N. Y. 100; Weir v. St. Paul, etc. R. Co., 18 Minn. 155; Boston Water-Power Co. v. Boston, etc. R. Co., 23 Pick. 360; Giesy v. Cincinnati, etc. R. Co., 4 Ohio St. 308.

[2] Bonaparte v. Camden, etc. R. Co., Baldwin, 226; Bloodgood v. Mohawk, etc. R. Co., 18 Wend. 9; Cooley's Const. Lim., ch. 15; Bradshaw v. Rogers, 20 Johns. 103; Carson v. Coleman, 11 N. J. Eq. 106; Symonds v. Cincinnati, 14 Ohio, 148; Ginn v. Moultrie, etc. Drainage District, 188 Ill. 305, 58 N. E. Rep. 988.

[3] Id.; Chicago, etc. R. Co. v. Melville, 66 Ill. 329; Weckler v. Chicago, 61 Ill. 142; Sutton v. Louisville, 5 Dana, 28; Ferris v. Bramble, 5 Ohio St. 199; Covington Short Route Transfer Co. v. Piel, 87 Ky. 267, 8 S. W. Rep. 449.

[4] See Earle v. Commonwealth, 180 Mass. 579, 63 N. E. Rep. 10, 57 L. R. A. 292.

[5] See ch. 2, Lewis on Eminent Domain, 2d ed.

[6] Columbia, etc. Bridge Co. v. Geisse, 35 N. J. L. 563; Austin v. Augusta Terminal R. Co., 108 Ga. 671, 34 S. E. Rep. 852, 47 L. R. A. 755; Pennsylvania Co. v. Pennsylvania, etc. R. Co., 151 Pa. 334, 25 Atl. Rep. 107, 31 Am. St. 762.

of waiver or discharge, or by his dereliction.[1] The right to it exists not only when land is taken, but, in some states, when it is in any manner injuriously invaded though not taken.[2] Where a railroad corporation claiming to act under legislative authority removed a natural barrier situated between the land, the injury to which was in question, and the railroad, such barrier having theretofore completely protected the meadow on such land from the effect of freshets and floods in a neighboring river, it was held that, although the barrier was wholly beyond the boundaries of the land, yet, as its removal caused the water to overflow such land, the owner had the same right to compensation as though a portion of it had been taken by [432] the company.[3] If, however, land is not taken or touched in the construction and operation or use of a public work there can be no claim for damages for any consequential injury unless the constitution or a statute uses a broader term than "taken." Under the sanction of the legislature a railroad bridge was built over a stream within the limits of a city; on the destruction of the bridge by fire the city proceeded to erect another bridge on substantially the same site, but built it so that it might be used not only for a railroad bridge, but also for the accommodation of foot passengers and teams. The plaintiff, who owned a foundry on the stream, and mainly relied on it for power to propel his machinery, sought to enjoin the construction of the bridge until compensation was awarded him for the loss produced by building the piers for the bridge

[1] Western, etc. R. Co. v. Johnston, 59 Pa. 290. See Driscoll v. Taunton, 160 Mass. 486, 494, 36 N. E. Rep. 495; Kremer v. Chicago, etc. R. Co., 51 Minn. 15, 52 N. W. Rep. 977, 38 Am. St. 468.

A corporation which enters upon and appropriates the land of another to its own use, without right, cannot transfer its privileges to another so as to justify a continuance of the wrong in its vendee, as if the latter were an innocent purchaser. It is a taking in both instances without making compensation. Stickley v. Chesapeake & O. R. Co., 93 Ky. 323, 20 S. W. Rep. 261.

[2] Pumpelly v. Green Bay Co., 13 Wall. 166; Eaton v. B. C. & M. R. Co., 51 N. H. 504, 12 Am. Rep. 147; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Stetson v. Chicago, etc. R. Co., 75 Ill. 74; Conniff v. San Francisco, 67 Cal. 45, 7 Pac. Rep. 41.

[3] Eaton v. B. C. & M. R. Co., *supra;* Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Aurora v. Reed, 57 Ill. 29, 11 Am. Rep. 1; Toledo, etc. R. Co. v. Morrison, 71 Ill. 616; St. Louis, etc. R. Co. v. Capps, 72 Ill. 191; Gillham v. Madison County R. Co., 49 Ill. 488.

in the channel of the stream. It was held that no cause of action existed, as his land was not touched, and the damage, if there was any at all, was too indirect or consequential.[1]

This is, substantially, the doctrine of the supreme court of the United States, which declares that the remedy for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta, and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. . . . The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly v. Green Bay Co.[2] and in Eaton v. Railroad Co.[3] In those cases it was held that permanent flooding of private property may be regarded as a taking. In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession.[4] This rule is not affected by an act of congress requiring condemnation proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted, where the state statute relates only to the damages which are to be allowed as a condition upon which railroad companies may con-

[1] Swett v. Troy, 12 Abb. Pr. (N. S.) 100; Cleveland, etc. R. Co. v. Speer, 56 Pa. 325, 94 Am. Dec. 84; Davidson v. Boston & M. R. Co., 3 Cush. 91; Kokomo v. Mahan, 100 Ind. 242; In re Thompson, 43 Hun, 416; Longworth v. Meriden & W. R. Co., 61 Conn. 451, 23 Atl. Rep. 827; Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. Rep. 489; Pennsylvania Co. v. Pennsylvania, etc. R. Co., 151 Pa. 334, 25 Atl. Rep. 107, 31 Am. St. 762. See Fitchburg R. Co. v. Boston & M. R. Co., 3 Cush. 58; In re Union Village, etc. R. Co., 53 Barb. 457.

[2] 13 Wall. 166.

[3] 51 N. H. 504, 12 Am. Rep. 147.

[4] Transportation Co. v. Chicago, 99 U. S. 635.

demn lands, and the proceedings instituted by the United States are for the condemnation for river improvement purposes. In the case in which this was held these conclusions were announced: First, that a mere temporary flooding, not amounting to a "taking," and not the result of negligent construction or maintenance, is an injury consequential upon the proper and lawful improvement of a navigable river, and is not such an injury as would be actionable. Second. To now seek compensation for the remainder of the land on the theory that the dam will be so constructed and maintained as to permanently flood the remainder and amount to a "taking" of such land is premature. Third. Neither the anticipated change in the current of the river, nor the anticipated increase in danger from fire during the work of construction, are proper subjects for compensation. Both are injuries purely consequential, and constitute no actionable claim against the government.[1]

§ 1062. Consequential injury to property not taken. The general scope of the provisions of the several constitutions concerning the taking, injuring or damaging of private property under the power of eminent domain cannot be discussed here. The necessity for doing so does not exist because the subject has been fully considered and treated of in a recent work.[2] It will serve the writer's purpose to call attention to a few of the leading cases which construe such provisions as require compensation to be made for property "injured," "damaged" or "destroyed." After some fluctuation in opinion and contrariety of decision, the Illinois court has settled its doctrine to be that under the clause in the constitution of that state which provides for compensation if property is "damaged," that "a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character, that it does not require that the damage shall be caused by a trespass or an actual physical invasion of the owner's real estate; but if the construction and operation of the railroad or other improvement is the cause of the damage,

[1] High Bridge Lumber Co. v. United States, 69 Fed. Rep. 320, 16 C. C. A. 460.

[2] Lewis on Eminent Domain (2d ed.). See article in 8 Va. Law Reg. 525.

though consequential, the party damaged may recover," if his damage is special and such as gave him a right of action at common law.[1] This is in harmony with recent cases in other states.[2] In California and Missouri the right to compensation when property is "damaged" is not restricted to a case in which its owner would be entitled to recover as for a tort at common law. "If he is consequentially damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage, if it is special to him over and above that which is sustained by the public in general."[3] Nearly all the cases agree that the injury or damage must be special. If noise, smoke, dust, cinders or

[1] Rigney v. Chicago, 102 Ill. 64; Chicago, etc. R. Co. v. Ayres, 106 id. 511; Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820; Chicago, etc. R. Co. v. Leah, 152 Ill. 249, 38 N. E. Rep. 556; Same v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575; Chicago North Shore Street R. Co. v. Payne, 192 Ill. 239, 61 N. E. Rep. 467, 94 Ill. App. 466. See Chicago v. Spoor, 190 Ill. 340, 60 N. E. Rep. 540.

Under a statute providing that a railroad company shall pay all damages occasioned by laying out, making and maintaining its road or by taking land or materials therefor, the fact that the change of the grade of a street made the use thereof by a property owner on another part of the street inconvenient does not show that he was specially damaged, though his only means of communication with other streets was by using that the grade of which was being altered. But it was otherwise where the latter street was closed for a long time, cutting off his access to other streets. Putnam v. Boston & P. R. Corp., —— Mass. ——, 65 N. E. Rep. 790.

[2] Griffin v. Shreveport & A. R. Co., 41 La. Ann. 808, 6 So. Rep. 624; Chicago, etc. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93; Pennsylvania, etc. R. Co. v. Walsh, 124 Pa. 544, 17 Atl. Rep. 186, 10 Am. St. 611; Same v. Ziemer, 124 Pa. 560, 17 Atl. Rep. 187; Pause v. Atlanta, 98 Ga. 92, 100, 26 S. E. Rep. 489, 58 Am. St. 290; Louisville v. Hegan, 20 Ky. L. Rep. 1532, 49 S. W. Rep. 532; Henderson v. McClain, 19 Ky. L. Rep. 1450, 43 S. W. Rep. 700; Stewart v. Council Bluffs, 84 Iowa, 61, 50 N. W. Rep. 219; Alabama & V. R. Co. v. Bloom, 71 Miss. 247, 15 So. Rep. 72; Vicksburg v. Herman, 72 Miss. 211, 16 So. Rep. 434; Spencer v. Metropolitan Street R. Co., 120 Mo. 154, 22 L. R. A. 668, 23 S. W. Rep. 126; O'Brien v. Philadelphia, 150 Pa. 589, 24 Atl. Rep. 1047; Hobson v. Philadelphia, 150 Pa. 595, 24 Atl. Rep. 1048; Blair v. Charleston, 43 W. Va. 62, 26 S. E. Rep. 341, 64 Am. St. 837, 35 L. R. A. 852; Eachus v. Los Angeles, etc. R. Co., 103 Cal. 614, 37 Pac. Rep. 750, 42 Am. St. 149; A. & N. R. Co. v. Boerner, 34 Neb. 240, 51 N. W. Rep. 842, 33 Am. St. 637; Omaha v. Flood, 57 Neb. 124, 77 N. W. Rep. 379; Hurt v. Atlanta, 100 Ga. 274, 28 S. E. Rep. 65. See Pueblo v. Strait, 20 Colo. 13, 36 Pac. Rep. 789, 46 Am. St. 273, 24 L. R. A. 392.

[3] Reardon v. San Francisco, 66 Cal. 492, 6 Pac. Rep. 317, 56 Am. Rep. 109; St. Louis v. Brown, 155 Mo. 545, 56 S. W. Rep. 298.

things of that sort are shown to have damaged the property itself they may be considered in fixing the amount of recovery;[1] but they are to be disregarded if they result merely in an inconvenience, or only cause discomfort to the occupants of the property.[2] Mississippi appears to be an exception. There the owner of property abutting on a street in which a railroad track is laid may recover for the physical inconvenience resulting to himself in the enjoyment of his property regardless of whether the fee of the street is in him or in the public, and though the inconvenience necessarily arises from the proper management of the road.[3] In Kentucky the rule is that where the proximity of a railroad to a dwelling is such as to prevent reasonable ingress and egress to and from the premises, or to necessarily cause soot and cinders to enter the dwelling, there is a taking of property.[4] The special damage done to an abutting owner by changing the grade of a street is within the meaning of the word "damaged."[5] But there cannot be a recovery for the injury done to improvements put upon land after the grade was fixed,[6] and, according to some courts, the improvements are not to be regarded in fixing the damage

[1] Illinois Central R. Co. v. Turner, 194 Ill. 575, 63 N. E. Rep. 798, and local cases cited; Calumet & C. Canal & D. Co. v. Morawetz, 195 Ill. 398, 63 N. E. Rep. 165.

[2] Reardon v. San Francisco, *supra;* Eachus v. Los Angeles, etc. R. Co., 103 Cal. 614, 37 Pac. Rep. 750, 42 Am. St. 149; Aldrich v. Metropolitan West Side E. R. Co., 195 Ill. 456, 57 L. R. A. 237, 63 N. E. Rep. 155; Austin v. Augusta Terminal R. Co., 108 Ga. 671, 34 S. E. Rep. 852, 47 L. R. A. 755 (two judges dissenting), and numerous cases referred to in the majority opinion; Campbell v. Metropolitan Street R. Co., 82 Ga. 320, 9 S. E. Rep. 1078; McMahon v. St. Louis, etc. R. Co., 41 La. Ann. 827, 6 So. Rep. 640; Metropolitan West Side E. R. Co. v. Goll, 100 Ill. App. 323.

[3] Alabama & V. R. Co. v. Bloom, 71 Miss. 247, 15 So. Rep. 72.

[4] Fulton v. Short Route R. Transfer Co., 85 Ky. 640, 4 S. W. Rep. 332; Louisville & N. R. Co. v. Finley, 86 Ky. 294, 5 S. W. Rep. 753; Stickley v. Chesapeake & O. R. Co., 93 Ky. 323, 20 S. W. Rep. 261.

[5] Hickman v. City of Kansas, 120 Mo. 110, 23 L. R. A. 658, 25 S. W. Rep. 225; Davis v. Missouri Pacific R. Co., 119 Mo. 180, 24 S. W. Rep. 777; Harmon v. Omaha, 17 Neb. 548, 23 N. W. Rep. 503; Harvard v. Crouch, 47 Neb. 133, 66 N. W. Rep. 267; Montgomery v. Townsend, 80 Ala. 489; McElroy v. Kansas City, 21 Fed. Rep. 257; Hot Springs R. Co, v. Williamson, 45 Ark. 436; Rearden v. San Francisco, 66 Cal. 492, 6 Pac. Rep. 317; Atlanta v. Green, 67 Ga. 386; Fort Worth v. Howard, 22 S. W. Rep. 1059 (Tex.).

[6] Clinkenbeard v. St. Joseph, 122 Mo. 641, 27 S. W. Rep. 521; Blair v. Charleston, 43 W. Va. 62, 26 S. E. Rep. 341, 35 L. R. A. 852.

done by changing the grade of a street.[1] The right of the abutting owner to be compensated for the difference between the value of his property just before a street was vacated and its value immediately thereafter is not affected because he has access to his property by another street.[2] Loss of business is not to be regarded in fixing the damage which results from the elevation of a railroad track and the depression of a street under the subway, the work being done on the right of way.[3] The same rule applies where the change of the grade of a street is made by a city.[4]

In Nebraska the liability for consequential injury to property not taken exists although the property used, and from the use of which the injury proceeds, was obtained by purchase.[5] But the general and better rule is that where property which might have been condemned is purchased the consideration is conclusively presumed to cover all damages to the remainder of the tract for which the owner could have obtained compensation in condemnation proceedings.[6] Where payment is required to be made or secured in advance of doing the work, only such injuries are contemplated as are capable of being estimated at the time the work is being done.[7] The measure of compensation is governed by the difference between the market value of the property before and after the injury.[8] If the property damaged was erected and used for a particular purpose, and was available for that purpose only, the recovery may be on the basis of its lessened value therefor.[9]

§ 1063. What is just compensation. There is some conflict of decision in respect to what constitutes just compensa-

[1] Dale v. St. Joseph, 59 Mo. App. 566; Groff v. Philadelphia, 150 Pa. 594, 24 Atl. Rep. 1048.

[2] Heinrich v. St. Louis, 125 Mo. 424, 28 S. W. Rep. 626.

[3] Chicago v. McShane, 102 Ill. App. 239.

[4] Chicago v. Jackson, 196 Ill. 496, 63 N. E. Rep. 1013.

[5] Chicago, etc. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93.

[6] Nunnamaker v. Columbia Water Power Co., 47 S. C. 485, 25 S. E. Rep. 751, 34 L. R. A. 222; Chicago, etc. R. Co. v. Smith, 111 Ill. 363; Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. Rep. 521, 23 L. R. A. 674.

[7] Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 13 Atl. Rep. 690; Montgomery v. Townsend, 84 Ala. 478, 4 So. Rep. 780.

[8] Montgomery v. Townsend, 80 Ala. 489; McMahon v. St. Louis, etc. R. Co., 41 La. Ann. 827, 6 So. Rep. 640; Omaha Belt R. Co. v. McDermott, 25 Neb. 714, 41 N. W. Rep. 648; Springer v. Chicago, 135 Ill. 552, 26 N. E. Rep. 514, 12 L. R. A. 609.

[9] Birch v. Lake Roland E. R. Co., 83 Md. 382, 34 Atl. Rep. 1013.

tion. According to the best authorities, however, it is believed to be remuneration for the net injury which is suffered from the exercise of this sovereign right. The word "compensation" imports that a wrong or injury has been inflicted and must be redressed in money. Money must be paid to the extent of the injury. This may be less or more than the value of the property taken; but when compensation has been made to the extent of the injury the language and just purpose of the constitution are satisfied.[1] A loss of the property taken will often be but a part of the injury to its owner; and, on the other hand, the value of the part taken may be wholly or partially compensated in fact by direct and special benefits resulting from taking his adjacent property. Where the value of that taken is not arbitrarily required to be paid for, the constitution or statute requiring only full indemnity, its value and [433] the damages or benefits to the residue, if any, are taken into account, and such sum allowed as will make the owner whole.[2] Where, by reason of the location of a railroad over a

[1] Symonds v. Cincinnati, 14 Ohio, 175.

[2] Phillips v. Scales Mound, 195 Ill. 353, 63 N. E. Rep. 180; San Francisco, etc. R. Co. v. Caldwell, 31 Cal. 374; Betts v. Williamsburgh, 15 Barb. 255; Commonwealth v. Norfork, 5 Mass. 435; Meacham v. Fitchburg R. Co., 4 Cush. 291; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Kilbourne v. Suffolk, 120 Mass. 393, 21 Am. Rep. 522; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Commonwealth v. Coombs, 2 Mass. 492; Commonwealth v. Middlesex, 9 id. 388; Matter of Furman Street, 17 Wend. 658; People v. Mayor, 4 N. Y. 419; Indiana Central R. Co. v. Hunter, 8 Ind. 74; McIntire v. State, 5 Blackf. 384; Greenville, etc. R. Co. v. Partlow, 5 Rich. 421; White v. Charlotte, etc. R. Co., 6 Rich. 47; Upton v. South Reading Branch R. Co., 8 Cush. 600; McMasters v. Commonwealth, 3 Watts, 292; Alexander v. Baltimore, 5 Gill, 383, 46 Am. Dec. 630; Livermore v. Jamaica, 23 Vt. 361; White v. County Commissioners, 2 Cush. 361; Shaw v. Charlestown, 2 Gray, 107; Dickenson v. Fitchburg, 13 Gray, 546; Young v. Harrison, 17 Ga. 30; Alton, etc. R. Co. v. Carpenter, 14 Ill. 190; Root's Case, 77 Pa. 276; Green v. Chicago, 97 Ill. 370; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Chase v. Portland, 86 Me. 367, 29 Atl. Rep. 1104, citing the text; Stockton v. Chicago, 136 Ill. 434, 26 N. E. Rep. 1095; Wolters v. St. Louis, 132 Mo. 1, 33 S. W. Rep. 441; Omaha Southern R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289; Bennett v. Marion, 106 Iowa, 628, 76 N. W. Rep. 844; Penley's Case, 89 Me. 313, 36 Atl. Rep. 397; McReynolds v. Kansas City, etc. R. Co., 110 Mo. 484, 19 S. W. Rep. 824; Board of Education v. Kanawha & M. R. Co., 44 W. Va. 71, 29 S. E. Rep. 503; Metropolitan, etc. R. Co. v. Stickney, 150 Ill. 362, 37 N. E. Rep. 1098; Osgood v. Chicago, 154 Ill. 194, 41 N. E. Rep. 40; Stewart v. Council Bluffs, 84 Iowa, 61, 50 N. W. Rep. 219; Lotze v. Cincinnati, 61 Ohio St. 272, 55 N. E. Rep. 828. See § 1084.

part of a lot of land, and the filling up of a canal in which the owner of the lot had a privilege, the value of the land was so enhanced that it was worth more than the entire lot was before, he was held to have no claim for damages.[1] It is long settled law in Connecticut that where the owner has a claim for damages for land taken, and has received local and special benefits equal thereto, these shall be set off against the damage, and he shall be allowed nothing. It is true that his entire benefit may be exhausted in this application, while the benefits received by his neighbors are assessed only a small percentage, and thus there may be a seeming and perhaps a real inequality; but so long as his benefit equals his damage he cannot be said to suffer by the taking of his property for public use, and there would be an injustice in compelling others to pay him for damage that really has no existence.[2]

The damages to be awarded are not to be lessened by a revocable privilege accorded the property owner by the condemning party,[3] nor by testimony to the effect that it was the intention of such party to repair the injury done.[4] The rule of avoidable consequences does not make it the duty of one whose property has been taken to incur expense in changing it so that, by adapting it to new uses, he may increase its value.[5]

In some states costs incurred in obtaining a judgment for damages enter into the judgment and must be allowed as part of the just compensation to which the property owner is entitled.[6] This rule extends to such reasonable costs and disbursements as are taxable in favor of the prevailing party in similar proceedings incurred by a property owner in securing both the ascertainment and payment of the compensation due him, including costs incurred in fruitless endeavors to collect the award made in condemnation proceedings.[7] But in Con-

[1] Whitman v. Boston, etc. R. Co., 3 Allen, 133.

[2] Trinity College v. Hartford, 32 Conn. 478; Nichols v. Bridgeport, 23 id. 189, 60 Am. Dec. 636; Nicholson v. New York, etc. R. Co., 22 Conn. 74, 56 Am. Dec. 390.

[3] St. Louis, etc. R. Co. v. St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. Rep. 399.

[4] Colorado M. R. Co. v. Brown, 15 Colo. 193, 25 Pac. Rep. 87.

[5] Fort Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. Rep. 1059.

[6] Epling v. Dickson, 170 Ill. 329, 48 N. E. Rep. 1001; United States v. Dumplin Island, 1 Barb. 24.

[7] Stolze v. Milwaukee, etc. R. Co., 113 Wis. 44, 88 N. W. Rep. 919, 90 Am. St. 833.

necticut the defendant in condemnation proceedings cannot recover costs incurred. "In assessing damages in a personal action for an unlawful injury the legal costs and expenses which may have fallen upon the plaintiff by reason of the acts complained of cannot be considered. Under a statute he may be awarded the taxable costs, but if so they come as an addition to his just compensation, and he could not claim them at common law unless it were a proper case for the allowance of smart money. The same rule applies, and with even greater reason, to *in rem* proceedings under the power of eminent domain, for here the injury to or taking of the defendant's property is done by right, or, at least, under color of right."[1] This is probably the law in California.[2] The condemning party has been held not to be liable for the counsel fees paid the property owner.[3] But it is competent for the legislature to impose liability therefor.[4]

§ 1064. Measure of compensation. The general measure of just compensation is the fair market value of the land taken where all the owner's land is taken,[5] market value being what the owner, if desirous of selling, would sell for, under ordinary circumstances, for cash,[6] and what reasonable persons, desirous of purchasing, would pay;[7] and where a part only is taken, the [434] difference in value of the whole before the taking and its

[1] New Milford Water Co. v. Watson, — Conn. —, 52 Atl. Rep. 947, citing Stevens v. Danbury, 53 Conn. 9, 23, 22 Atl. Rep. 1071.

[2] San Francisco, etc. R. Co. v. Leviston, 134 Cal. 412, 66 Pac. Rep. 473.

[3] San Jose, etc. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. Rep. 522. See § 1072.

[4] Gano v. Minneapolis, etc. R. Co., 114 Iowa, 713, 87 N. W. Rep. 714; Lough v. Same, 116 Iowa, 31, 89 N. W. Rep. 77.

[5] Kiernan v. Chicago, etc. R. Co., 123 Ill. 188, 14 N. E. Rep. 18; Indiana, etc. R. Co. v. Allen, 100 Ind. 409; Chaffee's Appeal, 56 Mich. 244, 22 N. W. Rep. 871; Newman v. Metropolitan E. R. Co., 118 N. Y. 618, 13 N. E. Rep. 901, 7 L. R. A. 289; Alloway v. Nashville, 88 Tenn. 511, 13 S. W. Rep. 123, 8 L. R. A. 123; San Francisco, etc. R. Co. v. Caldwell, 31 Cal. 374; Bohm v. Metropolitan E. R. Co., 129 N. Y. 576, 29 N. E. Rep. 802, 14 L. R. A. 344; Odell v. New York E. R. Co., 130 N. Y. 690, 29 N. E. Rep. 998; West Chicago Street R. Co. v. Chicago, 172 Ill. 198, 50 N. E. Rep. 185; Northern Pacific, etc. R. Co. v. Coleman, 3 Wash. 238, 28 Pac. Rep. 514.

[6] Phillips v. Scales Mound, 195 Ill. 353, 63 N. E. Rep. 180.

[7] Ligare v. Chicago, etc. R. Co., 166 Ill. 249, 46 N. E. Rep. 803; Shreveport & Red River Valley R. Co. v. Hinds, 50 La. Ann. 781, 24 So. Rep. 187; Missouri Pacific R. Co. v. Porter, 112 Mo. 361, 20 S. W. Rep. 568.

Market value is not a universal test, cases often arising where some other method of ascertaining value

value as affected by it.[1] It is immaterial to the application of the rule last stated that a statute provides that the compensation for land taken shall be on the basis of the value of the

must be resorted to. Beale v. Boston, 166 Mass. 53, 43 N. E. Rep. 1029, and cases cited.

If the land taken, because of its peculiar shape and surroundings, has no actual market value, considered as a separate and independent tract, its value may be fixed by the value of land immediately adjoining of the same average quality, capacity and character. Ohio Southern R. Co. v. Snyder, 5 Ohio Dec. 480.

[1] Id.; Bigelow v. West Wisconsin R. Co., 27 Wis. 478; Parks v. Wisconsin Central R. Co., 33 Wis. 413; Howe v. Ray, 113 Mass. 88; Tucker v. Massachusetts Central R. Co., 118 id. 546; Dickenson v. Fitchburg, 13 Gray, 546; Page v. Chicago, etc. R. Co., 70 Ill. 324; Harrison v. Iowa, etc. R. Co., 36 Iowa, 323; Curtis v. St. Paul, etc. R. Co., 20 Minn. 28; Colville v. Same, 19 id. 283; Chicago, etc. R. Co. v. Francis, 70 Ill. 238; Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Mix v. La Fayette, etc. R. Co., 67 Ill. 319; Peoria, etc. R. Co. v. Sawyer, 71 Ill. 361; Bloomington v. Miller, 84 Ill. 621; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Wilmington, etc. R. Co. v. Stauffer, 60 Pa. 374, 100 Am. Dec. 574; Cummings v. Williamsport, 84 Pa. 472; Pennsylvania, etc. R. Co. v. Bunnell, 81 id. 414; Shenango, etc. R. Co. v. Braham, 79 id. 447; East Brandywine, etc. R. Co. v. Ranck, 78 id. 454; St. Louis, etc. R. Co. v. Teters, 68 Ill. 144; Jones v. Chicago, etc. R. Co., 70 Ill. 380; Haslam v. Galena, etc. R. Co., 64 Ill. 353; Dearborn v. Boston, etc. R. Co., 24 N. H. 179; Atchison, etc. R. Co. v. Blackshire, 10 Kan. 477; Hooper v. Savannah & M. R. Co., 69 Ala. 529; Little Rock, etc. R. Co. v. Allen, 41 Ark. 431; Chicago, etc. R. Co. v. Smith, 111 Ill. 363; Chicago & E. R. Co. v. Blake, 116 id. 163, 4 N. E. Rep. 488; Same v. Bowman, 112 Ill. 595; Reisner v. Union Depot & R. Co., 27 Kan. 382; Wichita & W. R. Co. v. Kuhn, 38 id. 104, 16 Pac. Rep. 75; Asher v. Louisville & N. R. Co., 87 Ky. 391, 8 S. W. Rep. 854; Benton v. Brookline, 151 Mass. 250, 23 N. E. Rep. 846; Grand Rapids, etc. R. Co. v. Chesebro, 74 Mich. 466, 42 N. W. Rep. 66; Port Huron, etc. R. Co. v. Voorheis, 50 Mich. 506, 15 N. W. Rep. 882; Wilmes v. Minneapolis & N. R. Co., 29 Minn. 242, 13 N. W. Rep. 39; Sullivan v. Lafayette Co., 61 Miss. 271; Balfour v. Louisville, etc. R. Co., 62 id. 508; Fremont, etc. R. Co. v. Whalen, 11 Neb. 585, 10 N. W. Rep. 491; Chicago, etc. R. Co. v. Wiebe, 25 Neb. 542, 41 N. W. Rep. 297; Philadelphia v. Linnard, 97 Pa. 242; Washburn v. Milwaukee, etc. R. Co., 59 Wis. 364, 375, 18 N. W. Rep. 328; Bohm v. Metropolitan E. R. Co., 129 N. Y. 576, 29 N. E. Rep. 802, 14 L. R. A. 344; Odell v. New York E. R. Co., 130 N. Y. 690, 29 N. E. Rep. 998; Galesburg, etc. R. Co. v. Milroy, 181 Ill. 243, 54 N. E. Rep. 939; Slattery v. St. Louis, 120 Mo. 183, 25 S. W. Rep. 521; Harvard v. Crouch, 47 Neb. 133, 66 N. W. Rep. 276; Chicago, etc. R. Co. v. Sturey, 55 Neb. 137, 75 N. W. Rep. 557; Thompson v. Citizens' Traction Co., 181 Pa. 131, 37 Atl. Rep. 205; Fort Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. Rep. 1059; Blair v. Charleston, 43 W. Va. 62, 26 S. E. Rep. 341, 64 Am. St. 837, 35 L. R. A. 852; Board of Education v. Kanawha & M. R. Co., 44 W. Va. 71, 29 S. E. Rep. 503; Jones v. Seattle, 23 Wash. 753, 63 Pac. Rep. 553; Chicago v. Anglum, 104 Ill. App. 188; Mayor v. Higgins, — Miss. —, 33 So. Rep. 1; Mead v. Pittsburg, 194 Pa. 392, 45 Atl. Rep.

real estate appropriated.[1] The "due compensation" the landowner is entitled to is not affected by his recovery in an action of trespass against the defendant for unlawfully building and operating a railroad over the land which is sought to be condemned.[2]

In some cases the general rule of recompense as stated is not admitted to be just. In Kentucky it has been held that the value of the taken land to its owner, "considering its relative position to his other lands, and the other circumstances which may diminish or enhance that value, can alone afford him a just compensation for its loss."[3] In a case in which the property condemned consisted of a homestead the jury was directed to assess the owner's damage at the real value in money to him of the premises, and the court refused to instruct that the consequential injury or inconvenience to him should be considered. In answering objections to the instruction and refusal the appellate court observed: "The appellee owned no property adjacent to the property condemned, and the damages he sustained, if any, in addition to the value of the property taken, were caused by the inconvenience and loss resulting from his being deprived of his home and place of business; and to say that no such facts should enter into the estimate of value would be unjust to the owner and place him in a condition

59; Kremer v. Chicago, etc. R. Co., 51 Minn. 15, 22, 52 N. W. Rep. 977, 38 Am. St. 468; Duluth & W. R. Co. v. West, 51 Minn. 163, 53 N. W. Rep. 197; Missouri Pacific R. Co. v. Porter, 112 Mo. 361, 20 S. W. Rep. 568; Matter of New York & Brooklyn Bridge, 18 App. Div. 8, 45 N. Y. Supp. 464; Galbraith v. Philadelphia Co., 2 Pa. Super. Ct. 359; Richmond & M. R. Co. v. Humphreys, 90 Va. 425, 18 S. E. Rep. 901; Enoch v. Spokane Falls & N. R. Co., 6 Wash. 393, 33 Pac. Rep. 966; Chicago, etc. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575; Braun v. Metropolitan, etc. R. Co., 166 Ill. 434, 46 N. E. Rep. 974; Louisville, etc. R. Co. v. Barrett, 91 Ky. 487, 16 S. W. Rep. 278; Mobile, etc. R. Co. v. Riley, 119 Ala. 260, 24 So. Rep. 858; Mobile & O. R. Co. v. Hester, 122 Ala. 249, 25 So. Rep. 220; West Virginia, etc. R. Co. v. Gibson, 94 Ky. 234, 21 S. W. Rep. 1055; Rourke v. Central Massachusetts Electric Co., 177 Mass. 46, 58 N. E. Rep. 470; Osgood v. Chicago, 154 Ill. 194, 41 N. E. Rep. 40; Davis v. Northwestern E. R. Co., 170 Ill. 595, 48 N. E. Rep. 1058; Lough v. Minneapolis, etc. R. Co., 116 Iowa, 31, 89 N. W. Rep. 77.

[1] Haggard v. Independent School District, 113 Iowa, 486, 85 N. W. Rep. 777.

[2] Hopson v. Louisville, etc. R. Co., 71 Miss. 503, 15 So. Rep. 37.

[3] Henderson & N. R. Co. v. Dickerson, 17 B. Mon. 178, 66 Am. Dec. 148; Robb v. Maysville, etc. Turnpike R. Co., 3 Met. 117. See § 1087.

where he had sustained actual injury, other than the market value of his property, without affording him any remedy for the wrong. This character of case is unlike an appropriation of a strip of land where the mere market value is the criterion, the taking working no other injury. Here the owner and his family have been deprived of their homestead and his place of business taken from him, and to allow him simply what such property is worth or would bring in the market would not compensate him for the injury sustained.[1]

The compensation is to be estimated once for all and according to the full measure of the right which the charter of the condemning party gives it, and not merely according to the mode and time of the exercise of that right in the first instance.[2] Under a statute of Minnesota the plaintiff may, in an action of ejectment, recover the value of the use and occupation of the land in addition to the usual compensation for taking it.[3]

§ 1065. Injury to property not taken. If property is materially or permanently diminished in value in consequence of the taking of part of it for public use the owner is entitled to full satisfaction in damages. Equity and justice require that he be compensated, not only for the land actually appropriated, but also for the incidental injury to the value of the residue. By so much as the real value of it as a whole is diminished in consequence of the taking and public use of a part, by so much is its owner injured. If the value of a farm is thus in fact depreciated damages therefor are recoverable without regard to the cause of such depreciation.[4] In a case in Wisconsin it was said to be inconvenient and troublesome to cross the track of a railroad from one part of a farm to another with cattle and

[1] Covington, etc. R. Co. v. Piel, 87 Ky. 267, 276, 8 S. W. Rep. 449. See § 1068.

[2] Joy v. Grindstone-Neck Water Co., 85 Me. 109, 26 Atl. Rep. 1052; Butler Hard Rubber Co. v. Newark, 61 N. J. L. 32, 40 Atl. Rep. 224.

[3] Fish v. Chicago, etc. R. Co., 84 Minn. 179, 87 N. W. Rep. 606.

[4] Patterson v. Boom Co., 3 Dill. 465; Newgass v. Railway Co., 54 Ark. 140, 15 S. W. Rep. 188; Metropolitan, etc. R. Co. v. Stickney, 150 Ill. 362, 383, 26 L. R. A. 773, 37 N. E. Rep. 1098; Joliet v. Adler, 71 Ill. App. 456; Bennett v. Marion, 106 Iowa, 628, 76 N. W. Rep. 844; West Virginia, etc. R. Co. v. Gibson, 94 Ky. 234, 21 S. W. Rep. 1055; Brady v. Kansas City Cable R. Co., 111 Mo. 329, 19 S. W. Rep. 953.

agricultural implements; that there was more or less danger to person and property in doing so; that grain and other property near the track were exposed to fire from locomotives; that horses were liable to be frightened by passing trains of cars, and to run away and destroy property, and that on account of these things the farm was less valuable. The evidence relating to these subjects was not offered for the purpose of laying the basis for the recovery of damages for such remote [435] and speculative injuries, but the object was to account for the decrease in the value of the property. On this subject Cole, J., said: "If in consequence of its exposure to these remote injuries the property is diminished one-half in value, then this decrease in value measures the actual loss to the owner, and, when compensated for this depreciation in the value of his property, he is not receiving compensation for some imaginary injury, some fanciful loss which may or may not occur, but he is paid for the real loss which he sustains by the building of the railroad across his property. If the construction of the road across his land depreciates the property one-half its value in the market, then he is damnified to this extent; it matters not what causes the depreciation in value, whether exposure to fire, annoyance from trains, or danger to person and property; the real question is whether, in consequence of the railroad, the property is diminished in value, and if so, how much; for this will measure the direct and necessary loss which the owner has sustained by the construction of the road over his land."[1]

If the land is rendered less valuable because it is exposed to

[1] Snyder v. Western Union R. Co., 25 Wis. 60; Weyer v. Chicago, etc. R. Co., 68 id. 180, 31 N. W. Rep. 710; Little Rock, etc. R. Co. v. Allen, 41 Ark. 431; Chicago, etc. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. Rep. 798; Same v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575; Omaha Southern R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289; Fremont, etc. R. Co. v. Bates, 40 Neb. 381, 58 N. W. Rep. 959; Schuler v. Board of Supervisors, 12 S. D. 460, 81 N. W. Rep. 890. See Hutchinson v. Chicago & N. R. Co., 37 Wis. 582, 610; Neilson v. Chicago, etc. R. Co., 58 id. 516, 17 N. W. Rep. 310.

In an Illinois case the jury were instructed that they might consider all injuries and inconveniences which are appreciable and which they believed from the evidence are reasonably probable and likely to result from the use of the land, although such injuries or inconveniences may be largely conjectural, and not susceptible of definite ascertainment. The words "largely conjectural" were held to render

fire, or if access to it is rendered more difficult, or if the use of the remainder is more inconvenient by reason of the railroad; or if its value is depreciated by the noise, smoke, or increased dangers caused by such use, all these are to be included in the estimate of damages; not that witnesses are to be called upon to estimate the damages for each or any of them; for though they enter into the estimates the question is what is the market value of the land without, and what is the market value of the remainder of the piece with, the railroad; in other words, what is the value of the piece which is taken, and how much is the residue depreciated in its market value by its separation and by the construction of the railroad. These two sums added together give the amount of compensation to which the injured party is entitled.[1] The claimant must prove his damages, not necessarily with precision and accuracy, but approximately; unless he does so his recovery cannot exceed a nominal sum.[2] Where, for the purpose of widening a street, a part of a lot and building was taken, the front wall being torn down, and the removal of the elevator being made necessary, the tenant of the premises, who was bound to pay rent and was obliged to make repairs if he continued to occupy them, was entitled to recover the sum necessary to make the repairs.[3]

§ 1066. Same subject; what facts pertinent. To ascertain the fact of depreciation as a consequence of the taking and use of part of a parcel of land before the improvement is actually completed and its ultimate effect on the value [436] is practically realized, the consequences of particular facts have to be in some measure anticipated. There is not entire agreement as to the particular facts or kind of facts which may be proved and considered in order to determine such depreciation. In Pennsylvania it has been said that only such can be proved as are fair to be considered as a ground of damages on general principles; such as show injury as the certain

the instruction erroneous, but otherwise the supreme court made no criticism upon it. Chicago & P. R. Co. v. Hildebrand, 136 Ill. 467, 27 N. E. Rep. 69.

[1] In re Utica, etc. R. Co., 56 Barb. 464.

[2] Peoria, etc. R. Co. v. Peoria & F. R. Co., 105 Ill. 110; Braun v. Metropolitan, etc. R. Co., 166 Ill. 434, 46 N. E. Rep. 974.

[3] Gluck v. Mayor, etc., 81 Md. 315, 32 Atl. Rep. 515, 48 Am. St. 515.

and immediate consequence of the construction and proposed use of the part taken.[1] But this strictness is not observed in all the cases. It is said that such items as diversion of surface water, the invasion of privacy, the deprivation of means of access, the burden of additional fencing, the change of roads, the immediate danger of fire, not arising from negligence, and like matters, are to be considered so far as they affect market value.[2] In other states the facts relied on or available to prove such depreciation are not uniformly subjected to such a precise test as was favored in the state referred to, but their admissibility and force are decided by their supposed tendency to affect in fact the price and value of the property. All the facts which a prudent person desiring to buy the property affected would consider may be made the subject of evidence. Hence circumstances are often taken into account which, in no other view, could be a ground of damage.[3] The increased exposure by fire, not resulting from negligence,[4] by

[1] The language of Gibson, C. J., has often been quoted in Pennsylvania: "The jurors are to consider the matter just as if they were called on to value the injury at the moment when compensation could be first demanded; they are to value the injury to the property without reference to the person of the owner or the actual state of his business, and in doing that the only safe rule is to inquire what would the property, unaffected by the obstruction, have sold for at the time the injury was committed. What would it have sold for as affected by the injury? The difference is the true measure of compensation." Schuykill Navigation Co. v. Thoburn, 7 S. & R. 411, approved in Philadelphia Ball Club v. Philadelphia, 192 Pa. 632, 44 Atl. Rep. 265, 73 Am. St. 835. See New York, etc. R. Co. v. Young, 33 Pa. 175; Patten v. Northern Central R. Co., id. 426, 75 Am. Dec. 612; Searle v. Lackawanna, etc. R. Co., 33 Pa. 57; Watson v. Pittsburgh, etc. R. Co., 37 id. 469; Lehigh, etc. R. Co. v. Lazarus, 28 id. 203; Chambers v. South Chester, 140 id. 510, 21 Atl. Rep. 409.

[2] Hewitt v. Pittsburg, etc. R. Co., 19 Pa. Super. Ct. 304, citing Dawson v. Pittsburgh, 159 Pa. 317, 28 Atl. Rep. 171; Regenthaler v. Philadelphia, 160 Pa. 195, 28 Atl. Rep. 840; Struthers v. Philadelphia, etc. R. Co., 174 Pa. 291, 34 Atl. Rep. 443.

[3] Bigelow v. West Wisconsin R. Co., 27 Wis. 478; Western Pennsylvania R. Co. v. Hill, 56 Pa. 460; Patterson v. Boom Co., 3 Dill. 465; St. Louis, etc. R. Co. v. Teters, 68 Ill. 144; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Keithsbury, etc. R. Co. v. Henry, 79 Ill. 290; Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 495; Platt v. Milford, 66 Conn. 320, 34 Atl. Rep. 82; Metropolitan, etc. R. Co. v. Springer, 171 Ill. 170, 49 N. E. Rep. 416; Omaha v. Flood, 57 Neb. 124, 77 N. W. Rep. 379; McMillan v. Philadelphia Co., 1 Pa. Super. Ct. 648; Schuler v. Board of Supervisors, 12 S. D. 460, 81 N. W. Rep. 890, citing the text.

[4] Chicago, etc. R. Co. v. Palmer, 44 Kan. 110, 24 Pac. Rep. 342; Kay v.

laying and operating railroads near buildings and through fields is very generally allowed to be proved to show damage by depreciation.[1] "As to risk from fire incident to the lawful operation of a road, there are two theories upon which the claimant for damages can properly argue that such risk is material evidence in his favor. 1. He can claim that the danger is so imminent that no man of common prudence would maintain his building in such proximity to the railroad. In that case he is entitled to the cost of removal of his building and its reconstruction in a safe place. 2. If the danger be not great, either from the fire-proof character of the structure, or its distance from the railroad, yet if it can still be said there is some risk from fire by reason of the lawful operation of the road, he can claim that that fact depreciates the market value of the land entered upon." In neither case is evidence of the contents of a building so situated admissible, because the owner is bound to remove them in the first case, and, in the second, their value is not material because it is wholly specu-

Glade Creek & R. R. Co., 47 W. Va. 467, 35 S. E. Rep. 973.

[1] Hatch v. Cincinnati, etc. R. Co., 18 Ohio St. 92; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Colvill v. St. Paul, etc. R. Co., 19 Minn. 283; Curtis v. Same, 20 Minn. 28; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 495; Pierce v. Worcester, etc. R. Co., 105 Mass. 199; Adden v. White Mts. N. H. R., 55 N. H. 413, 20 Am. Rep. 220; Little Rock, etc. R. Co. v. Allen, 41 Ark. 431; Chicago, etc. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. Rep. 814; Same v. Aldrich, 134 Ill. 9, 24 N. E. Rep. 763; Centralia & C. R. Co. v. Brake, 125 Ill. 393, 17 N. E. Rep. 820; Dudley v. Minnesota & N. R. Co., 77 Iowa, 408, 42 N. W. Rep. 359; Pingrey v. Cherokee & D. R. Co., 78 Iowa, 438, 43 N. W. Rep. 285; Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608, 5 Pac. Rep. 15; Johnson v. Chicago, etc. R. Co., 37 Minn. 519, 35 N. W. Rep. 438; Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436, 1 Atl. Rep. 555; Setzler v. Pennsylvania, etc. R. Co., 112 Pa. 56, 4 Atl. Rep. 370; Chicago, etc. R. Co. v. Patterson, 26 Ind. App. 295, 59 N. E. Rep. 688; Chicago, etc. R. Co. v. Hunter, 128 Ind. 213, 27 N. E. Rep. 477; Mobile & O. R. Co. v. Hester, 122 Ala. 249, 25 So. Rep. 220; Hercules Iron Works v. Elgin, etc. R. Co., 141 Ill. 491, 501, 30 N. E. Rep. 1050; Chicago, etc. R. Co. v. Nix, 137 Ill. 141, 27 N. E. Rep. 81; Same v. Atterbury, 156 Ill. 281, 40 N. E. Rep. 826; Rock Island, etc. R. Co. v. Gordon, 184 Ill. 456, 56 N. E. Rep. 810; Indiana, etc. R. Co. v. Stauber, 185 Ill. 9, 56 N. E. Rep. 1079; Chicago, etc. R. Co. v. Moore, 63 Ill. App. 163; Omaha Southern R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 515, 30 Pac. Rep. 738. See § 1080 as to abutting owners in New York. *Contra*, Fremont, etc. R. Co. v. Whalen, 11 Neb. 585, 590, 10 N. W. Rep. 491; In re Union Village & J. R. Co., 53 Barb. 457.

lative. "What quantity of material will be stored when a possible future accidental fire occurs cannot be foreseen; therefore, its present value on the happening of a problematical event in the future is a mere conjecture or guess."[1]

[437] In some states the danger to which the owner and his family[2] and stock[3] are exposed in crossing the track from one part of a farm to another is provable for the same purpose.

[1] Hamilton v. Pittsburg, etc. R. Co., 190 Pa. 51, 42 Atl. Rep. 369.

In Lehigh Valley R. Co. v. Lazarus, 28 Pa. 203, it was held that the risk of fire being communicated from locomotives to buildings cannot be taken into consideration in estimating the damages sustained by the owner of land arising from the construction of a railroad over it, because of the uncertain and contingent nature of such damages. Sunbury & E. R. Co. v. Hummell, 27 Pa. 99; Indiana Natural Gas Co. v. Jones, 14 Ind. App. 55, 42 N. E. Rep. 487; Manufacturers' Natural Gas Co. v. Leslie, 22 Ind. App. 677, 51 N. E. Rep. 510.

In Wilmington, etc. R. Co. v. Stauffer, 60 Pa. 374, 100 Am. Dec. 574, it was held that if the railroad were laid near a barn, and the danger of fire was necessarily so imminent that no man of common prudence would use the barn as such, then the premises would be depreciated by its being rendered useless.

In Patten v. Northern Central R. Co., 33 Pa. 426, 75 Am. Dec. 612, it was held that increased cost of insurance could not be considered. This is held in Iowa on the ground that the property owner is not bound to insure. Pingery v. Cherokee & D. R. Co., 78 Iowa, 438, 43 N. W. Rep. 285. And inasmuch as the liability of the railroad company would not be affected by any insurance there might be on the property, this position seems tenable. But it is held otherwise in Minnesota. Cedar Rapids, etc. R. Co. v. Raymond, 37 Minn. 204, 33 N. W. Rep. 704.

In Illinois and Massachusetts the increased cost of insuring buildings near a railroad right of way may be proven. Indiana, etc. R. Co. v. Stauber, 185 Ill. 9, 56 N. E. Rep. 1079; Webber v. Eastern R. Co., 2 Met. 147.

Evidence concerning the experience another land-owner has had with fires caused on his land by the same railroad company is inadmissible. Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436, 1 Atl. Rep. 555.

This element of depreciation in value is not eliminated by proof that the precautions taken by the company are such as to render it probable or even certain that no fires will be caused by it, because there is no assurance that the precautions will always be observed. Pingery v. Cherokee & D. R. Co., 78 Iowa, 438, 43 N. W. Rep. 285.

If by statute absolute liability is imposed for fires caused by railroad companies, the danger therefrom must not be considered. St. Louis, etc. R. Co. v. North, 31 Mo. App. 345, 351.

[2] Weyer v. Chicago, etc. R. Co., 68 Wis. 180, 31 N. W. Rep. 710; Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415, 421; Chicago, etc. R. Co. v. Aldrich, 134 Ill. 9, 24 N. E. Rep. 763; Chicago, etc. R. Co. v. Shafer, 49 Neb. 25, 68 N. W. Rep. 342. Compare McReynolds v. Burlington, etc. R. Co., 106 Ill. 152.

[3] Id.; Chicago, etc. R. Co. v. Bow-

If the remainder of a lot is rendered less valuable by reason of being severed or disfigured by the taking and proposed use of a part, such damage may be allowed as shall be found to have resulted therefrom. In determining the consequent depreciation the jury may consider the use to which the part taken is appropriated, the character, situation, present and probable use of the remainder, the distance of the owner's buildings from the public use, and any facts which they, from a view of the testimony, shall find injure the value of the premises by the proper and legal use of the appropriated part.[1] If taking part of a tract increases the expense of mov-

man, 122 Ill. 595, 13 N. E. Rep. 814; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Omaha Southern R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289. Compare McReynolds v. Burlington, etc. R. Co., 106 Ill. 152.

Later Illinois cases hold that probable damage to stock is too remote and speculative to be considered in estimating damages. Centralia & C. R. Co. v. Brake, 125 Ill. 393, 17 N. E. Rep. 820; Chicago, etc. R. Co. v. Eaton. 136 Ill. 9, 26 N. E. Rep. 575. And so of danger to persons or buildings if the latter are not near enough to be likely to be burned. Conness v. Indiana, etc. R. Co., 193 Ill. 464, 62 N. E. Rep. 221.

The fact that horses may be frightened by locomotives cannot be considered in estimating damages. Chicago, etc. R. Co. v. Mason, 26 Ind. App. 395, 59 N. E. Rep. 185; Atchison, etc. R. Co. v. Lyon, 24 Kan, 745; Florence, etc. R. Co. v. Pember, 45 id. 625, 26 Pac. Rep. 1.

[1] Peoria, etc. R. Co. v. Sawyer, 71 Ill. 361: Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Tucker v. Massachusetts Central R., 118 Mass. 546; Watson v. Pittsburgh, etc. R. Co., 37 Pa. 469; Cleveland, etc. R. Co. v. Ball, 5 Ohio St. 569; Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Little Rock, etc. R. Co. v. Allen, 41 Ark. 431; Commissioners v. Hogan, 39 Kan. 606, 18 Pac. Rep. 611; Grand Rapids, etc. R. Co. v. Chesebro, 74 Mich. 466, 42 N. W. Rep. 66; Missouri Pacific R. Co. v. Hays, 15 Neb. 224, 18 N. W. Rep. 51; St. Louis, etc. R. v. Anderson, 39 Ark. 167; McReynolds v. Burlington, etc. R. Co., 106 Ill. 159; Chicago, etc. R. Co. v. Bowman, 122 id. 595, 13 N. E. Rep. 814; St. Louis, etc. R. Co. v. McAuliff, 43 Kan. 185, 23 Pac. Rep. 102; Commissioners v. Harkleroads, 62 Miss. 807; Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436, 1 Atl. Rep. 555; Same v. Bentley, 88 Pa. 178; Louisville, etc. R. Co. v. Barrett, 91 Ky. 487, 16 S. W. Rep. 278; Churchill v. Beethe, 48 Neb. 87, 66 N. W. Rep. 992, 35 L. R. A. 442; Chicago, etc. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. Rep. 326; Hercules Iron Works v. Elgin, etc. R. Co., 141 Ill. 491, 501, 30 N. E. Rep. 1050; Springfield v. Dalby, 139 Ill. 34, 29 N. E. Rep. 860; Chicago, etc. R. Co. v. Nix, 137 Ill. 141, 27 N. E. Rep. 81; Chicago, etc. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. Rep. 798; Chicago Terminal Transfer R. Co. v. Bugbee, 184 Ill. 353, 56 N. E. Rep. 386; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. Rep. 581; Abbott v. Southern Pacific R. Co., 109 Cal. 282, 41 Pac. Rep. 1099; Chicago, etc. R. Co. v. O'Connor, 42 Neb. 90, 102, 60 N.

ing freight to and from the remainder and thereby affects a business conducted thereon, that fact should be regarded.[1] The existing physical condition of land over which a railroad is to be laid, whether affected by another railroad, a water-course, or other natural or artificial object, may be considered in ascertaining the damage that will result to it.[2] If a proper construction of the proposed road will necessitate making a cut through a portion of the land taken, that fact may be considered in awarding compensation for that not appropriated.[3] Where a part has been taken for a railroad it is proper to consider all inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, from smoke, invasion of privacy, the deprivation of light, means of access and like matters, so far as they severally arise from the use of the strip taken and upon it, excluding all common and indirect damages, that is, such as affect the owner in common with all other members of the community.[4] This qualification of the rule, it has been said, is too difficult of application to be of any particular value. Evidence was properly received to show the inconvenience resulting from the proximity of a school-house to the residence of the plaintiff, notwithstanding that inconvenience was not peculiar to him.[5] The right to interfere with property by jarring and shaking a

W. Rep. 326; Mangles v. Chosen Freeholders, 55 N. J. L. 88, 25 Atl. Rep. 222; Omaha Southern R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289; Fremont, etc. R. Co. v. Bates, 40 Neb. 381, 58 N. W. Rep. 959; Shano v. Fifth Avenue, etc. Bridge Co., 189 Pa. 245, 42 Atl. Rep. 128, 69 Am. St. 808, and several local cases cited.

[1] Richmond, etc. R. Co. v. Chamblin, — Va. —, 41 S. E. Rep. 750.

[2] Chicago, etc. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. Rep. 814.

[3] Cummins v. Des Moines, etc. R. Co., 63 Iowa, 397, 19 N. W. Rep. 268.

[4] Ham v. Wisconsin, etc. R. Co., 61 Iowa, 716, 17 N. W. Rep. 157; Dudley v. Minnesota & N. R. Co., 77 Iowa, 408, 42 N. W. Rep. 359; Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608, 5 Pac. Rep. 15; Leroy & W. R. Co. v. Ross, 40 Kan. 598, 2 L. R. A. 217, 20 Pac. Rep. 197; Blue Earth County v. St. Paul, etc. R. Co., 28 Minn. 503, 11 N. W. Rep. 73; Bowen v. Atlantic, etc. R. Co., 17 S. C. 574; Shaw v. Philadelphia, 169 Pa. 506, 32 Atl. Rep. 593; Chicago, etc. R. Co. v. Moore, 63 Ill. App. 163; Chicago Office Building v. Lake Street E. R., 87 Ill. App. 594; Illinois Central R. Co. v. Schmidgall, 91 Ill. App. 23; Lincoln v. Commonwealth, 164 Mass. 368, 376, 41 N. E. Rep. 489, and cases cited; Chicago, etc. R. Co. v. Nix, 137 Ill. 141, 27 N. E. Rep. 81; Omaha, etc. R. Co. v. Doney, 3 Kan. App. 515, 43 Pac. Rep. 831; Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. Rep. 557.

[5] Haggard v. Independent School District, 113 Iowa, 486, 494, 85 N. W. Rep. 777.

dwelling, causing smoke to penetrate the rooms occupied by the family, and casting dust, ashes and cinders upon the furniture therein, is in the nature of an easement and must be paid for.[1] In Pennsylvania if nothing but an easement is taken, smoke, noise, ashes and vibration are not elements of compensation.[2] In New York there is no easement of privacy or quiet in premises abutting on a street which enter into the consideration of the award in proceedings by a railroad company to acquire an easement in the street.[3]

The extent of the use which will be made of the land taken, as its proximity to the depot and the number of tracks laid, is the subject of proof.[4] On the other hand, it is competent for a railroad company authorized to construct and operate a road in a city to bind itself by a stipulation as to the use which will be made of it — as that it would carry passengers only, that no soft or bituminous coal should be used in operating it, and that the motive power should be fully equipped with the best modern devices calculated to render it noiseless and smokeless, and to prevent the discharge of cinders and sparks. Such a stipulation is admissible on the question of the compensation and the damages to be awarded.[5] In an action to recover damages caused by changing the grade of a street it is competent to receive in evidence contracts made by the city at the time the suit was begun the execution of which would reduce the damages to the plaintiff.[6] After the damages awarded have been paid into court and the moving party has taken possession of the property condemned, it may, on the subsequent trial of the question of damages on appeal from the award, in reduction of the damages offer to build and maintain for the land-owner open crossings to facilitate the use of his land as one tract.[7] Evidence that the location of a rail-

[1] Long Island R. Co. v. Garvey, 159 N. Y. 334, 54 N. E. Rep. 60.

[2] Philips v. Philadelphia & R. T. R. Co., 184 Pa. 537, 39 Atl. Rep. 298.

[3] Matter of Seaside & B. Bridge E. R. Co., 83 Hun, 143, 31 N. Y. Supp. 630.

[4] Cedar Rapids, etc. R. Co. v. Raymond, 37 Minn. 204, 33 N. W. Rep. 704.

[5] Lieberman v. Chicago & South Side Rapid Transit Co., 141 Ill. 140, 30 N. E. Rep. 544.

[6] Joliet v. Blower, 155 Ill. 414, 40 N. E. Rep. 619, reversing 49 Ill. App. 464.

[7] St. Louis, etc. R. Co. v. Clark, 121 Mo. 169, 25 S. W. Rep. 192, 906. To the same effect, Chicago & A. R. Co. v. Joliet, etc. R. Co., 105 Ill. 388, 44 Am. Rep. 799; Elgin, etc. R. Co. v.

road across a farm made it more difficult to rent it has been received on the question of damages.[1] Depreciation in rental value may be shown as tending to prove depreciation in market value,[2] and it is immaterial whether the rent is payable in money or in a share of the crops.[3] But depreciation in the rental value is not necessarily the measure of recovery.[4] Proof may be made of the rents received for property while a change of grade was being made in a street, the owner being entitled to recover for diminished rental value while the improvement was being made and for damages to the fee, the proceedings for condemnation being instituted after the change was made. "The amount of rents received is not the measure of damages, but the difference in the rental value of the property is, and the actual effect of the improvement upon the property may be shown as bearing upon this question."[5] A land-owner is entitled to compensation for the taking of his property; hence he is not injured by the laying out of streets or highways upon it; his cause of complaint has its foundation in the opening of them,[6] unless a highway by dedication or user existed,

Fletcher, 128 Ill. 619, 21 N. E. Rep. 577; McGregor v. Equitable Gas Co., 139 Pa. 230, 21 Atl. Rep. 13.

[1] Pittsburgh, etc. R. Co. v. Rose, 74 Pa. 363; Streyer v. Georgia Southern & F. R. Co., 90 Ga. 56, 15 S. E. Rep. 637.

Where a statute prohibited the erection of new buildings within five feet of the existing street line and the owner built that distance back therefrom and in a recess between two buildings standing evenly with the former line of the street, the inconvenience to occupants of the new building caused by its situation and the difficulty of procuring tenants for it were held to be facts affecting the value of the land at the time it was injured. But the assessment was to be made in view of the requirement of the statute as to the erection of other buildings and on the assumption that at some indefinite future time there will be an appreciation in the value of the property by reason of the removal of the projecting portions of the adjoining buildings. Philadelphia v. Linnard, 97 Pa. 242.

[2] Rock Island, etc. R. Co. v. Gordon, 184 Ill. 456, 56 N. E. Rep. 810; Omaha v. Hansen, 36 Neb. 135, 54 N. W. Rep. 83; Gallagher v. Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250, affirmed without opinion, 164 N. Y. 602.

[3] Fremont, etc. R. Co. v. Bates, 40 Neb. 381, 58 N. W. Rep. 959, citing the text.

[4] New Milford Water Co. v. Watson, — Conn. —, 52 Atl. Rep. 947.

[5] Matter of Grade Crossing Commissioners, 17 App. Div. 54, 44 N. Y. Supp. 844, 154 N. Y. 550, 49 N. E. Rep. 127; Birch v. Lake Roland Elevated R. Co., 83 Md. 362, 34 Atl. Rep. 1013.

[6] Eachus v. Los Angeles, etc. R. Co., 103 Cal. 614, 621, 37 Pac. Rep. 750, 42 Am. St. 149; Dickerman v. New York, etc. R. Co., 72 Conn. 271, 44 Atl. Rep. 228. Compare Harlan

in which case there would not be liability for any damages.[1] Where a street is opened through land the injury to the latter is to be estimated without reference to the fact that an unopened street is laid out over the same land. If the latter street shall be opened the damages resulting will be ascertained with regard to the physical condition of the land as it may then be.[2]

If liability to make compensation for property damaged exists and the grade of a street has been raised so as to leave abutting property below its level, the cost of filling in the lot and raising the buildings thereon may be proven to show the diminution in the value of the property,[3] as may the value of the trees and sidewalks destroyed, and the cost of relaying pipes.[4] A city cannot show, to diminish the damages, that the execution of a general plan of street improvements which it has adopted will lessen such cost.[5] These circumstances cannot be shown to establish the measure of recovery, but only to prove the lessened value of the property.[6] Where there has been a recovery for decrease in value by reason of the change of the grade of a street there is no liability for the cost of protecting the property; such cost was a part of the diminution in value.[7]

§ 1067. Same subject. Where a part of the owner's land was liable to be washed and to cave off where there was a bank and sand drifted from the road to the injury of the [438] adjoining land, and these facts resulted unavoidably from the building of a railroad in a suitable and proper manner, the resulting loss was considered in estimating the depreciation from building the road.[8] So where the right of way for a railroad

County v. Hogsett, 60 Neb. 362, 83 N. W. Rep. 171.

[1] Potter v. Putnam, 74 Conn. 189, 50 Atl. Rep. 395.

[2] Opening of Negley Avenue, 146 Pa. 456, 23 Atl. Rep. 221; Grugan v. Philadelphia, 158 Pa. 337, 27 Atl. Rep. 1000.

[3] Augusta v. Schrameck, 96 Ga. 426, 23 S. E. Rep. 400, 51 Am. St. 146; Mead v. Pittsburg, 194 Pa. 392, 45 Atl. Rep. 59; Cook v. Ansonia, 66 Conn. 413, 34 Atl. Rep. 183; Farwell v. Chicago, etc. R. Co., 52 Neb. 614, 72 N. W. Rep. 1036; Patton v. Philadelphia, 175 Pa. 88, 34 Atl. Rep. 344.

[4] Cook v. Ansonia, *supra*.

[5] Estes v. Macon, 103 Ga. 780, 30 S. E. Rep. 246.

[6] McCombs v. Pittsburg, 194 Pa. 348, 45 Atl. Rep. 60; Mead v. Pittsburg, 194 Pa. 392, 45 Atl. Rep. 59.

[7] Covington v. Taffee, 24 Ky. L. Rep. 373, 68 S. W. Rep. 629.

[8] Dearborn v. Boston, etc. R. Co., 24 N. H. 179; Colvill v. St. Paul, etc. R. Co., 19 Minn. 282.

ran through a farm so as to sever a strip of about two acres from the body of the farm, thus rendering the strip useless for farming purposes, it was held that while compensation could not be demanded for such strip, it not being taken, yet it would form an element in estimating the damages the owner would sustain by the construction and operation of the road.[1] The owner of land over which a railroad sought to condemn a right of way may recover for loss of the beneficial use of a spring of water from which he is thus cut off,[2] and for injury to riparian rights generally;[3] but not for the loss of a mere privilege which he enjoys in common with the public,[4] nor for a facility to violate the law, as by taking cattle upon the bank of a canal to water them.[5] Where a riparian owner has the right to remove and sell sand deposited as an alluvium between high and low water mark on the bank of a navigable stream he may recover from a railroad company which erects a structure on the opposite bank in a way which changes the flow and the direction of the current so as to sweep away the sand and prevent future alluvium, notwithstanding the damages for the loss of future alluvium may be conjectural.[6] If the title in fee is taken to the land condemned the owner of it and of adjoining land which is drained by a system of drains having their outlet through a trunk sewer in the land to be taken may recover damages for the loss of his drainage, and for the loss of the right to use a public highway existing in such land.[7]

Whatever would be fixtures between a vendor and vendee must be paid for, notwithstanding they might be removed without injury to themselves.[8] A party who had procured

[1] Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Springfield & M. R. v. Rhea, 44 Ark. 258; Commissioners v. Harkleroads, 62 Miss. 807.

[2] Peoria, etc. R. Co. v. Bryant, 57 Ill. 473; Winklemans v. Des Moines N. W. R. Co., 62 Iowa, 11, 17 N. W. Rep. 82; Chicago, etc. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. Rep. 798.

[3] Organ v. Memphis, etc. R. Co., 51 Ark. 235, 272, 11 S. W. Rep. 96; Drury v. Midland R., 127 Mass. 571; Trowbridge v. Brookline, 144 id. 139, 10 N. E. Rep. 796; Washburn & M. Manuf. Co. v. Worcester, 153 Mass. 494, 27 N. E. Rep. 664.

[4] Gorgas v. Philadelphia, etc. R. Co., 144 Pa. 1, 22 Atl. Rep. 715.

[5] Philadelphia & R. R. Co. v. Reading & P. R. Co., 2 Pa. Dist. Rep. 857.

[6] Freeland v. Pennsylvania R. Co., 197 Pa. 529, 47 Atl. Rep. 745.

[7] Matter of Rochester, 24 App. Div. 383, 48 N. Y. Supp. 764.

[8] Matter of the Mayor, 39 App. Div. 589, 57 N. Y. Supp. 657; Diamond Mills Emory Co. v. Philadelphia, 8 Pa. Dist. Rep. 30.

fixtures for a water-cure establishment, which were rendered useless to him in consequence of taking a part of his premises for a public improvement, was entitled, in addition to other damages, to recover his loss on such fixtures.[1] In estimating the value of fixtures in a building which has been appropriated they are considered only so far as they enhance the value of the estate for any purpose for which it might be used.[2] This rule applies to improvements placed on premises by a lessee and to articles purchased to enable him to conduct his business, these being removable by him and the proceeding being by the owner of the property.[3]

Unless personal property is taken as material to be used in the improvement there cannot be a recovery for taking it or for any injury done; the remedy is by an action for trespass.[4] If chattels are not condemned and could have been removed their value cannot be recovered.[5] Where coal had been mined and placed upon the surface, mixed with dirt and slate, it was considered to be personal property, and for entirely depriving the plaintiff of it the party who did so was liable for its market value at the breaker when the taking occurred, less the estimated cost of removing, cleaning, screening and preparing it for market. In estimating its value after it was ready for market the advantage of getting a present lump sum, instead of instalments, from time to time by sales of the coal, and also a just allowance for wear and tear of machinery, interest on capital invested, etc., were proper subjects for consideration.[6]

If taking a part of a tract of land destroys a water-power on the residue damages therefor may be assessed.[7] If water which would otherwise come to a mill is diverted therefrom the mill-owner's damages are measured by the difference between the fair market value of his mill with all the water

[1] Price v. Milwaukee, etc. R. Co., 27 Wis. 98; Chicago, etc. R. Co. v. Ward, 128 Ill. 349, 18 N. E. Rep. 828, 21 id. 562.

[2] Allen v. Boston, 137 Mass. 319; Finn v. Providence Gas & W. Co., 99 Pa. 631.

[3] Pause v. Atlanta, 98 Ga. 92, 26 S. E. Rep. 489, 58 Am. St. 290.

[4] Becker v. Philadelphia & R. R. Co., 177 Pa. 252, 35 Atl. Rep. 617, 35 L. R. A. 583.

[5] Missouri Pacific R. Co. v. Porter, 112 Mo. 361, 20 S. W. Rep. 568.

[6] Lehigh Coal Co. v. Wilkes Barre & E. R. Co., 187 Pa. 145, 41 Atl. Rep. 37.

[7] Lake Superior, etc. R. Co. v. Greve, 17 Minn. 323; Barclay R. etc. Co. v. Ingham, 36 Pa. 194.

rights appurtenant thereto, and its value as diminished by the decrease in the quantity received, with interest from the time of the first diversion.[1] Where three tracts of land in a body were owned in severalty by three persons and, pursuant to a contract between them, the whole was used in common, and such tract was more valuable because it was so used, such owner was entitled to damages resulting from the separation of the land with water on it from the land used as pasture.[2] The party who has exercised the right of eminent domain and has thereby cut off access to timber or a water supply may show that other sources of supply are open to the person who claims damages and the expense at which they can be utilized,[3] or that the water diverted was practically worthless.[4] If a brook is converted into a sewer a mill-owner upon a river into which the brook empties and who has used its water for power may recover for the loss sustained by the depreciation in the quality of the water.[5] A railroad company which appropriates the bed of a stream and pollutes the water thereof by the ordinary operation of its road must compensate the owner, and the jury may consider the depreciation in the value of the land caused by the pollution.[6] The damages resulting from the diversion of water are not affected because the water is returned to the stream in the form of sewage at a point above a water power affected by the diversion, the disposition of the sewage being wholly within the control of the party who did the taking.[7] Where water is diverted from a mill the damages are assessable upon the assumption that the party who has diverted the water will draw all it can through the pipe as laid, although such was not the case when the proceedings

[1] Cowdery v. Woburn, 136 Mass. 409.

[2] Commissioners v. Labore, 37 Kan. 480, 15 Pac. Rep. 577. See Gorgas v. Philadelphia, etc. R. Co., 144 Pa. 1, 22 Atl. Rep. 715.

[3] Illinois, etc. R. & C. Co. v. Switzer, 117 Ill. 399, 57 Am. Rep. 875, 7 N. E. Rep. 664; Gulf, etc. R. Co. v. Brugger, 24 Tex. Civ. App. 367, 59 S. W. Rep. 556. Compare Miller v. Windsor Water Co., 148 Pa. 429, 23 Atl. Rep. 1132.

[4] Kiernan v. Chicago, etc. R. Co., 123 Ill. 188, 14 N. E. Rep. 18.

[5] Washburn & M. Manuf. Co. v. Worcester, 153 Mass. 494, 27 N. E. Rep. 664.

[6] Rudolph v. Pennsylvania, etc. R. Co., 186 Pa. 541, 40 Atl. Rep. 1083, 47 L. R. A. 782.

[7] In re Barre Water Co., 72 Vt. 413, 48 Atl. Rep. 653; Fisk v. Hartford, 69 Conn. 375, 37 Atl. Rep. 983, 38 L. R. A. 474.

for condemnation were had and probably would not be so for many years.[1] If properly constructed sewers will affect the atmosphere, or otherwise interfere with the use and enjoyment of premises, the jury may consider the fact.[2] The unsightliness of telegraph poles placed in a highway near the residence of the owner of adjoining land is a proper matter for proof, but not the liability of animals to injury by crowding between the poles and fence.[3]

§ 1068. Same subject. The commissioners or jury in determining what constitutes just compensation for taking land for a railroad may always take into consideration all incidental loss, inconvenience and damage, present and prospective, which will, or may be reasonably expected to, result from the construction and operation of the road in a legal manner, so far as they are special to the owner of the land not taken.[4] Accordingly they may always regard the exact condition in which the road may be when they make the assessment,[5] except so far as it is the result of an improper construction, when it must be recovered for in an independent proceeding or action.[6] Such a proceeding or action may also be brought when the condemning party makes such use of the land as was not within the contemplation of the parties when the damages were assessed in the condemnation proceeding.[7] Because it is impossible to draw a sharp line between the present and anticipations of the future the harm anticipated from the future use

[1] Leonard v. Rutland, 66 Vt. 105, 28 Atl. Rep. 885; In re Barre Water Co., 72 Vt. 413, 48 Atl. Rep. 653.

[2] Joplin Consolidated Mining Co. v. Joplin, 124 Mo. 129, 27 S. W. Rep. 406; Bennett v. Marion, 106 Iowa, 628, 634, 76 N. W. Rep. 844. See Taft v. Commonwealth, 158 Mass. 526, 33 N. E. Rep. 1046; Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. Rep. 489.

[3] Board of Trade Tel. Co. v. Darst, 192 Ill. 47, 61 N. E. Rep. 398.

[4] Ohio & M. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. Rep. 279; Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35, 65, 31 N. E. Rep. 138, 33 Am. St. 273.

[5] Alloway v. Nashville, 88 Tenn. 510, 8 L. R. A. 123, 13 S. W. Rep. 123; Shenandoah Valley R. Co. v. Shepherd, 26 W. Va. 672; Missouri, etc. R. Co. v. Haines, 10 Kan. 439; Hayes v. Ottawa, etc. R. Co., 54 Ill. 373; Wichita & W. R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. Rep. 75; Chicago, etc. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. Rep. 814.

[6] Neilson v. Chicago, etc. R. Co., 58 Wis. 516, 17 N. W. Rep. 310; Lyon v. Green Bay, etc. R. Co., 42 Wis. 538; Alloway v. Nashville, *supra;* Denniston v. Philadelphia Co., 1 Pa. Super. Ct. 599.

[7] Chicago, etc. R. Co. v. O'Connor, 42 Neb. 90, 103, 60 N. W. Rep. 326.

of a sewer may be recovered for as damages caused by the taking. "It is true that a jury ought not to speculate on the mere possibility that land may be put to disagreeable uses. But when land is taken and must be used for a particular purpose, the reasonably probable consequences of a lawful use for that purpose must be taken into consideration." [1] If a railroad company does not provide farm crossings under the statute, the damages to the land-owner are to be assessed in view of that fact, and are not to be reduced because they have been furnished at his request. In such a case his right to use them depends upon the will of the company.[2] An agreement made between the owner of land and a railroad company as a part of the consideration for a right of way over his land is to be read in connection with the deed conveying the right, and is not a mere privilege. On the loss of such right by the erection of a dam the company must make compensation.[3] The owner of flats crossed by a railroad bridge having raised the flats around and under the bridge within the location of the road, but without the consent of the proprietor thereof, was entitled to re-[439] cover by way of damages against such proprietor for so much of the expense of such raising and filling up as was necessary to enable him to enjoy his other lands, provided such necessity was caused by the location and construction of the railway.[4] Land was taken by a city to widen a highway after such land had been previously filled in by the owner in pursuance of an order of the municipal authorities to abate a public nuisance; the measure of damages was held to be the value of the land as it stood at the time of the taking; the expense incurred in filling it entering into the measure only so far as it had effect in increasing the value of the land.[5]

[1] Lincoln v. Commonwealth, 164 Mass. 368, 378, 41 N. E. Rep. 489; In re London, etc. R., 24 Q. B. Div. 326, 330, 331; Cowper Essex v. Local Board for Acton, 14 App. Cas. 153, 178; Newgass v. Railway Co., 54 Ark. 140, 15 S. W. Rep. 188.

[2] Cedar Rapids, etc. R. Co. v. Raymond, 37 Minn. 204, 33 N. W. Rep. 704; Drury v. Midland R., 127 Mass. 571, 584; Sanitary District of Chicago v. Loughran, 160 Ill. 362, 43 N. E. Rep. 359.

[3] Chicago, etc. R. Co. v. Miller, 106 Mo. 458, 17 S. W. Rep. 499.

[4] Commonwealth v. Boston, etc. R. Co., 3 Cush. 25; Paine Lumber Co. v. United States, 55 Fed. Rep. 854, 867.

[5] Squire v. Somerville, 120 Mass. 579. See Beale v. Boston, 166 Mass. 53, 43 N. E. Rep. 1029.

If property has been put to a particular use or business and its productive value is chiefly therefor, and the taking of part impairs that use, it is sometimes an important fact and may be proved to enhance damages according to the depreciation caused by destroying or impairing such business or use.[1] Thus, where the construction and use of a railroad over plaintiff's land had the effect of destroying the business of a mill thereon by driving away custom, it was a ground of damage. It appeared that, after the road was built and operated, customers ceased to carry grain there to be ground, and at least one-half of the custom had fallen off. The reason given was simply the danger in going to the mill with horses and teams, owing to the location of the road with reference to the mill.[2] In a proceeding by the lessee of premises to recover for injury it appeared that the plaintiff was under a contract to remove daily for the gas works of a city a large quantity of tar, and that the use of the premises in question enabled him to receive the tar without cost and to manufacture it without transporting it to and from distant points; that after the land was taken it became necessary to carry the tar to a place of distillation by a boat specially constructed, and that it was necessary to erect temporary works for the distillation of the tar when received, and to transport over inaccessible roads the barrels required in the business. Evidence of these facts was admissible to show the value of the lease.[3]

The Pennsylvania court has recently emphasized the rule that loss of custom resulting from the location of a road with reference to the place of business affected and other like circumstances are relevant only for the purpose of showing that the loss of custom detracted from the value of the land, and to what extent. There cannot be a recovery for the loss of custom as a specific item of claim, because the logical application of such a rule might enlarge the recovery beyond the value of the land.[4]

[1] Preston v. Cedar Rapids, 95 Iowa, 71, 63 N. W. Rep. 577.

[2] Western Pennsylvania R. Co. v. Hill, 56 Pa. 460; Dupuis v. Chicago, etc. R. Co., 115 Ill. 97, 3 N. E. Rep. 720; Jacksonville & S. R. Co. v. Walsh, 106 Ill. 253.

[3] Ehret v. Schuylkill River Eastside R. Co., 151 Pa. 158, 24 Atl. Rep. 1068.

[4] Pittsburgh, etc. R. Co. v. Vance, 115 Pa. 325, 8 Atl. Rep. 764; Miller v. Windsor Water Co., 148 Pa. 429, 23 Atl. Rep. 1132; Shaw v. Philadelphia,

The same rule has been recognized in other states.[1] Where the part of the land not taken was used by the owner as a ferry landing, and its usefulness for that purpose was not lessened, evidence as to the difference in value of the ferry before and after the taking was inadmissible. The increased inconvenience and danger to the public could not be regarded in estimating the damages done to the land by reason of the proximity of the railroad tracks unless the public were thereby deterred from using the ferry; neither was it an element of the damages that the railroad diverted custom from the ferry either as a common carrier or because its operation changed the route of public travel.[2] If by the appropriation by a bridge company of the landing of a ferry company the business of the latter is suspended during the building of the bridge and it is shown that the ferry would have had an earning capacity but for such act, the ferry company is entitled to recover damages for the destruction of its business during that interval. Such damages were not the result of competition.[3] This doctrine is in line with the view taken in Michigan. Judge Campbell, writing for the court, said: "Both of the appellants were using their property in lucrative business, in which the locality and its surroundings have some bearing on its value. Apart from the money value of the property itself they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether for want of access to another that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not

169 Pa. 506, 32 Atl. Rep. 593; Hamilton v. Pittsburg, etc. R. Co., 190 Pa. 51, 42 Atl. Rep. 369. See § 1071.

[1] Matter of Grade Crossing Commissioners, 17 App. Div. 54, 44 N. Y. Supp. 844, affirmed, 154 N. Y. 550, 49 N. E. Rep. 127, 58 Am. St. 290; Syracuse v. Stacey, 45 App. Div. 249, 61 N. Y. Supp. 165; Pause v. Atlanta, 98 Ga. 92, 105, 26 S. E. Rep. 489; Pegler v. Hyde Park, 176 Mass. 101, 57 N. E. Rep. 327.

[2] Missouri Pacific R. Co. v. Porter, 112 Mo. 361, 20 S. W. Rep. 568.

[3] Riverton Ferry Co. v. McKeesport & D. Bridge Co., 179 Pa. 466, 36 Atl. Rep. 186, distinguishing Bridgewater Ferry Co. v. Sharon Bridge Co., 145 Pa. 404, 22 Atl. Rep. 1039.

legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possession by making up to them the whole of their losses."[1] Where injury results to a business from the laying of tracks for a railroad in a street the recovery of lost profits cannot extend beyond the time when the person injured might, in the use of reasonable diligence, have procured another place of business equally eligible, including a reasonable time for removal.[2]

§ 1069. Same subject. Where a strip of land appropriated by defendant for the purpose of its railway was part of a larger tract used and occupied as an entirety as a site for a brick yard, it was ruled that evidence was admissible to show that, by the appropriation, the plaintiffs were prevented from enlarging their works and that, in consequence, the value of the brick yard as it was became depreciated; that it was proper to consider as an element of damage the effect upon the value of the premises and upon the convenience of conducting the plaintiffs' business thereon the circumstance that, in consequence of the railway, the plaintiffs were put to the necessity of frequently, for instance, one hundred times a day, crossing the track [440] in hauling clay to their pits.[3] So it has been held in Wisconsin that evidence of the business to which the plaintiff's adjoining property was devoted and of the effect upon such business of the taking of the property in question was properly admitted as bearing upon the question of damages, the court having duly instructed the jury that the proper measure thereof was the value of the land condemned and the diminution in market value of the other property.[4] Expenses which must necessarily be incurred in order to carry on a coal mine may be recovered, notwithstanding the appliances which may be procured may be more valuable and serviceable than those which must be discarded because of the taking and damaging

[1] Grand Rapids & I. R. Co. v. Weiden, 70 Mich. 390, 38 N. W. Rep. 294; Commissioners v. Moesta, 91 Mich. 149, 51 N. W. Rep. 903. See Detroit v. Beecher, 75 Mich. 454, 467, 42 N. W. Rep. 986, 4 L. R. A. 813, and Kentucky cases cited in § 1064, also Patterson v. Boston, 23 Pick. 425.

[2] Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35, 67, 31 N. E. Rep. 138, 33 Am. St. 273.

[3] Sherwood v. St. Paul, etc. R. Co., 21 Minn. 127.

[4] Driver v. Western Union R. Co., 32 Wis. 569, 13 Am. Rep. 726; King v. Minneapolis Union R. Co., 32 Minn. 224, 20 N. W. Rep. 135.

of the property.[1] Where part of a lot was condemned and there was annexed to it as appurtenances a right of way over the other part, a coal office and scales and a side track in an adjacent alley, these constituting the principal elements of value of the condemned part, the value of the appurtenances was properly regarded.[2] A railroad company built its road along the street of a town under an ordinance granting the right of way upon condition that the company should pay all damages that might accrue to property owners on such street by reason of the construction of the road. And it was held that the company was liable to a property owner for whatever deterioration in value his real estate may have undergone in consequence of laying its track, and for damages for interruption of his business during such time as it would necessarily require to provide another equally eligible place to remove to, and that the damages to his business during such time should be ascertained by proof of the probable reasonable profits which might have been made had there been no interruption of it. In that case, if he chose to remain and submit to the interruption and loss of profits, he would, nevertheless, be entitled to recover as damages the necessary cost to avoid such loss by a removal.[3] This doctrine is said, in a subsequent case, to be contrary to the general rule, and the cases cited in its support are criticised: It is a general rule that damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid.[4] In Chicago, etc. R. Co. v. Hock,[5] the circuit judge before whom the trial was had allowed the owner $5,500 for several items of damages without stating how much was allowed for each, and among which was "the inconvenience and cost of the removal of his business from said premises." Upon what evidence the item was allowed, or how much was allowed for that particular item, did not appear. The allowance was held not reversible error on the authority of St. Louis, etc. R. Co. v.

[1] Chicago, etc. R. Co. v. Wolf, 137 Ill. 360, 27 N. E. Rep. 78.

[2] Chicago, etc. R. Co. v. Ward, 128 Ill. 349, 18 N. E. Rep. 828, 21 id. 562.

[3] St. Louis, etc. R. Co. v. Capps, 72 Ill. 188, 67 Ill. 607; Chicago, etc. R. Co. v. Hock, 118 id. 587, 9 N. E. Rep. 205 (cost and inconvenience of removal). See Virginia, etc. R. Co. v. Henry, 8 Nev. 165.

[4] Lewis on Eminent Domain, sec. 488, and authorities cited in n. 4.

[5] 118 Ill. 587, 9 N. E. Rep. 205.

Capps.[1] That was an action on the case, and the defendant was held liable under the provisions of a city ordinance, and not under the eminent domain law of the state. The Hock case does recognize the rule that loss of profits sustained by the interruption of business is not a proper element of damage. In Atchison, etc. R. Co. v. Schneider,[2] the question of compensation being between the petitioner and holders of leases on the condemned property, both parties proceeded upon the theory that the tenants were entitled to receive the reasonable cost of removing and re-establishing their business, loss of business, etc., and hence the measure of compensation was not in controversy or decided. The effect of our holding in the late case of Metropolitan, etc. R. Co. v. Siegel[3] is that, in exceptional cases, the cost of removal from the premises, interruption in business, etc., may properly be considered in estimating the fair cash value to the owner, and the allowance of such items in that case was sustained solely on the ground that the petitioner had, as in the Schneider case, conceded upon the trial that that might properly be considered. All the cases recognize the general rule as stated, and it is certainly true that when the owner has been allowed the full cash market price of his property, taking into consideration the use to which he has devoted it, he has received just compensation therefor; and whenever a consideration of matters of personal inconvenience to the owner, loss of profits, damage to personal property and cost of removal is permissible, it must be when a sufficient foundation therefor has been laid, so that their consideration simply aids the jury and court in determining the fair cash value of the property in view of its present use.[4]

If recovery may be had for property injured as well as that taken the owner and lessee may join in an action to recover for the injury and the taking. The latter need not show that he holds under a written lease; his right is established by proof of a tenancy from year to year at a fixed annual rent. In estimating his damages it is proper to consider the facts that the removal of the business was made necessary, the depreciation in the value of the leasehold and of the machinery and per-

[1] 67 Ill. 607.

[2] 127 Ill. 144, 20 N. E. Rep. 41, 2 L. R. A. 422.

[3] 161 Ill. 638, 44 N. E. Rep. 276.

[4] Braun v. Metropolitan, etc. R. Co., 166 Ill. 434, 437, 46 N. E. Rep. 974.

sonal property used in the business as affected by the removal. The difference between the value of the machinery in connection with the business conducted where it was and its value after removal for the same or other use is an element of damage.[1] The fact that the tenancy would have terminated at the end of the year and the tenant's removal from the premises been thereby necessitated will not be assumed.[2] If the tenant's estate is limited to a particular use and the appliances used by him in conducting business are rendered useless by an entry thereon, and it becomes necessary to reconstruct them, and thereby the expense of doing business is increased and the profits are diminished by waste, all these matters may be proven as descriptive of the injury sustained and as affecting the market value of the lease, but not as specific items of damage.[3]

§ 1070. Same subject. If a building is an obstruction to a road and it is necessary to destroy it its value must be paid, estimating it as a building, and not the materials composing it;[4] but should the owner appropriate any of the debris remaining after its removal his recovery will be lessened *pro tanto*.[5] Where part of a lot upon which the owner had commenced to excavate, preparatory to erecting a large mercantile building, which had been contracted in advance to tenants, was taken for the purpose of widening a street and he moved the site of the building back, thereby taking one-half of another lot, it was ruled that it was proper to award as damages, in addition to the value of the land taken, the expense of moving the site, the loss occasioned by the delay in completing the building and the impairment in value of the adjoining lot in consequence of the use of part of it.[6]

[1] Getz v. Philadelphia & R. R. Co., 105 Pa. 547; Philadelphia & R. R. Co. v. Getz, 113 id. 214, 6 Atl. Rep. 356.

[2] Philadelphia & R. R. Co. v. Getz, *supra*.

[3] Kersey v. Railroad Co., 133 Pa. 234, 19 Atl. Rep. 553, 19 Am. St. 632, 7 L. R. A. 409.

[4] Finn v. Providence Gas & W. Co., 99 Pa. 631.

It is competent for the legislature to provide that the public, in taking land for highways, may take the buildings thereon absolutely, or may take no interest whatever in them. In such a case the owners have no right to compensation for the buildings beyond the expense of their removal. Mangles v. Chosen Freeholders, 55 N. J. L. 88, 25 Atl. Rep. 322.

[5] Lafayette, etc. R. Co. v. Winslow, 66 Ill. 219.

[6] St. Louis v. Brown, 155 Mo. 545, 56 S. W. Rep. 298.

Among the inconveniences resulting to a farmer from a railroad crossing his farm may be considered the fact that he is deprived of access to a river, and excluded from its bank for the purpose of fishing and from a fishing ground.[1] Under a statute providing that in estimating damages sustained [441] "regard should be had to all the damages done to the party, whether in taking his property or in injuring it in any manner," the owner of part of a building was held entitled to recover for the loss of support and of shelter caused by removing from his part the portion he did not own.[2] Where the erection of a railroad bridge across a river in a city causes permanent injury or depreciation in the value of a lot in the immediate vicinity which is used for dock purposes such injury is an element of damages in a suit by the owner, and it is proper for him to show such damages by proving the value of his property before the erection of the bridge and its value afterwards; or, in other words, to prove how much less the property would sell for in consequence of building the bridge.[3] Where the taking is for a canal its leakage may be considered on the question of damages,[4] and also the increased danger of overflowing lands not taken.[5] Obstructing drainage on land not taken is an element of damage.[6] The effect of cutting off light, air and access to premises upon their rentable and salable value may be shown,[7] as may the increased cost of irrigating uncultivated land.[8] The inconvenience of having a farm thrown open during the six months in which a railroad company is not required to fence its track is a material ele-

[1] Boston & M. R. v. Montgomery, 119 Mass. 114.

[2] Marsden v. Cambridge, 114 Mass. 490.

[3] Chicago, etc. R. Co. v. Stein, 75 Ill. 41; Durham & N. R. v. Trustees of Bullock Church, 104 N. C. 525, 10 S. E. Rep. 761, applying the rule to depreciation of church property for religious uses.

[4] James River & K. Co. v. Turner, 9 Leigh, 313; Van Schoick v. Delaware & R. Canal Co., 20 N. J. L. 249; Denver City Irrigation & W. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. 234.

[5] Chesapeake & O. Canal Co. v. Grove, 11 Gill & J. 398; Chicago, etc. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575.

[6] Duncan v. Board of Levee Commissioners, 74 Miss. 125, 20 So. Rep. 838; Indiana, etc. R. Co. v. Rinehart, 14 Ind. App. 588, 43 N. E. Rep. 238; Chicago, etc. R. Co. v. Moore, 63 Ill. App. 163.

[7] Chicago Office Building v. Lake Street E. R., 87 Ill. App. 594. See § 1080.

[8] San Bernardino & E. R. Co. v. Haven, 94 Cal. 489, 29 Pac. Rep. 875.

ment of damages, as well as the diminished use of the farm resulting therefrom.[1] If but a strip of the plaintiff's land is condemned, though that is much less than a railroad company requires, the cuts, embankments, tracks, ditches and right of way are to be regarded as one entire thing in awarding him damages.[2] If a piece of land taken be treated as part of a gas plant and its value fixed upon that basis, evidence of the amount of the capital stock and of the net earnings is admissible to show the value of the property before and after the taking.[3] In a recent case in New Jersey a city proposed to take a certain quantity of water from premises consisting of a factory with machinery driven by the waters of a stream, part of which it was proposed to take. The damages were assessed on the basis of the quantity of water proposed to be taken, regardless of the quantity actually used at the time the proceedings were instituted. If, in the judgment of the jury, it would be proper and judicious for the owner of the premises to install a separate plant of steam-power to supply the power lost by the diversion of the water, the expense of that method of reconstruction might be considered in ascertaining what was just compensation; but the owner was not entitled to any sum other than that which would reimburse his actual loss.[4]

In arriving at the damage caused by taking land for highway purposes the diversion of travel from a former highway with reference to which the plaintiff's buildings were located, increased taxes, the expense of building additional fences and other like circumstances were held to have been properly proven.[5] Where one end of a street was permanently closed the owner of premises on the street was not limited to the recovery of merely nominal damages, but was entitled to recover the sum by which the value of the estate was diminished. Evidence as to the business done on it was admissible

[1] Chicago, etc. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575.

[2] Chicago, etc. R. Co. v. Van Cleave, 52 Kan. 665, 33 Pac. Rep. 472, approving Blesch v. Chicago, etc. R. Co., 48 Wis. 168, 2 N. W. Rep. 113, and disapproving Kucheman v. C., C. & D. R. Co., 46 Iowa, 366.

[3] Spring City Gas Light Co. v. Pennsylvania, etc. R. Co., 167 Pa. 6, 31 Atl. Rep. 368.

[4] Butler Hard Rubber Co. v. Newark, 61 N. J. L. 32, 40 Atl. Rep. 224; Baird v. Schuylkill River East Side R. Co., 154 Pa. 463, 25 Atl. Rep. 834.

[5] Schuler v. Board of Supervisors, 12 S. D. 460, 81 N. W. Rep. 890.

to show for what purpose it was adapted, though not as a basis upon which to estimate the damage to the business. Evidence as to the amount of travel on the street before and after the condemnation was admissible for the purpose of showing the extent to which the property was isolated by closing up the street.[1] If liability exists for damage, the destruction of shade trees along a sidewalk is an element of the damage done in changing the grade of a street.[2] But where a second change of grade is made the expenses of the land-owner in connection with the original change cannot be proven.[3] On the abandonment of the easement acquired by a natural-gas company to bury its line in the soil and the exercise of the statutory right to remove the pipe, the land-owner can recover only to the extent that he was injured by what was otherwise done to that end than was strictly necessary to the prudent and careful removal of the pipes.[4] Aggravations connected with the entry and use of land for public purposes are not to be considered with a view to damages beyond just compensation.[5]

Where a road was constructed over land which was a stone quarry, the rock of which extended beyond the limits of the location, and that so situated was injured in the construction of the way, the owner was entitled to recover for such injury, regardless of whether the injury was done by the defendant or by its contractor.[6] If the condemning party has changed its plan of constructing its works in accordance with the request of the property owner, he cannot recover for such damage as is sustained in consequence of the change over that which would have accrued but for it.[7] Any use the owner may

[1] Johnston v. Old Colony R. Co., 18 R. I. 642, 29 Atl. Rep. 594, 49 Am. St. 800. See Proprietors of Locks & Canals v. Nashua & L. R. Corp., 10 Cush. 385, which, seemingly, favors a lesser measure of liability than the Rhode Island court.

[2] Walker v. Sedalia, 74 Mo. App. 70.

[3] Watson v. Columbia, 77 Mo. App. 267.

[4] Clements v. Philadelphia Co., 184 Pa. 28, 38 Atl. Rep. 1090, 39 L. R. A. 532.

[5] Lafayette, etc. R. Co. v. Winslow, 69 Ill. 219; King v. Iowa, etc. R. Co., 34 Iowa, 458; Cummins v. Des Moines, etc. R. Co., 63 id. 397, 19 N. W. Rep. 268; Fremont, etc. R. Co. v. Whalen, 11 Neb. 585, 10 N. W. Rep. 491; Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436, 443, 1 Atl. Rep. 555; Wabash, etc. R. Co. v. McDougall, 126 Ill. 111, 18 N. E. Rep. 291, 9 Am. St. 539, 1 L. R. A. 207.

[6] White v. Medford, 163 Mass. 164, 39 N. E. Rep. 997.

[7] Kansas City, etc. R. Co. v. Farrell, 76 Mo. 183.

make of condemned land, not inconsistent with the interest taken, may be considered in fixing the damages.[1]

§ 1071. Same subject; remote damages. The law does not afford indemnity for all losses occasioned by the laying and use of a railroad or the making of any public improvement, especially for such as are remote and consequential, or imaginary or fanciful.[2] They are damages not caused by the taking of land, but by the change which the improvement introduces into the course of business. The law affords no protection against or compensation for new competitions,[3] nor against changes introduced by time and the progress of the age;[4] nor does it afford relief against such inconveniences as the whole community suffer alike, in a greater or less degree, and which are to be borne in consideration of the greater general good to be acquired.[5] A party, a part of whose lands has

[1] Atlanta v. Hunnicutt, 95 Ga. 138, 22 S. E. Rep. 130.

[2] Minnesota, etc. R. Co. v. Doran, 17 Minn. 188; First Parish v. Middlesex, 7 Gray, 106; Green v. State, 73 Cal. 29, 11 Pac. Rep. 602, 14 id. 610; Detroit v. Beecher, 75 Mich. 454, 467, 42 N. W. Rep. 986, 4 L. R. A. 813; Commissioners v. Harkleroads, 62 Miss. 807; San Diego Land & T. Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372; United States v. Taffe, 86 Fed. Rep. 830; Metropolitan, etc. R. Co. v. Stickney, 150 Ill. 362, 37 N. E. Rep. 1098; Manufacturers' Natural Gas Co. v. Leslie, 22 Ind. App. 677, 51 N. E. Rep. 510; Chicago & P. R. Co. v. Hildebrand, 136 Ill. 467, 27 N. E. Rep. 69; Braun v. Metropolitan, etc. R. Co., 166 Ill. 434, 46 N. E. Rep. 974; Cook & Rathbone Co. v. Sanitary District of Chicago, 177 Ill. 599, 52 N. E. Rep. 870; Spring City Gas Light Co. v. Pennsylvania, etc. R. Co., 167 Pa. 6, 10, 31 Atl. Rep. 368; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. Rep. 738; Wallace v. Jefferson Gas Co., 147 Pa. 205, 23 Atl. Rep. 416; Illinois Central R. Co. v. Lostant, 167 Ill. 85, 47 N. E. Rep. 62.

Possible depreciation in the rental value of houses standing upon a tract of land intersected by a right of way, which may be caused by the operation of a railroad, is not *per se* imaginary or speculative. Rock Island & E. R. Co. v. Gordon, 184 Ill. 456, 56 N. E. Rep. 810.

[3] Fuller v. Edings, 11 Rich. 239; Cincinnati, etc. R. Co. v. Zinn, 18 Ohio St. 417; Adden v. White Mts. N. H. R., 55 N. H. 415, 20 Am. Rep. 220; Petition of Mount Washington Road Co., 35 N. H. 146; Edmands v. Boston, 108 Mass. 535; Schuylkill Navigation Co. v. Freedley, 6 Whart. 109; Organ v. Memphis, etc. R. Co., 51 Ark. 235, 11 S. W. Rep. 96; Moses v. Sanford, 11 Lea, 731; Shenandoah Valley R. Co. v. Shepherd, 26 W. Va. 672; Caledonian R. Co. v. Walker's Trustees, 7 App. Cas. 259; Missouri Pacific R. Co. v. Porter, 112 Mo. 361, 370, 20 S. W. Rep. 568; Bridgewater Ferry Co. v. Sharon Bridge Co., 179 Pa. 466, 22 Atl. Rep. 1039. See Patterson v. Boston, 23 Pick. 425.

[4] Id.; Chicago v. Spoor, 190 Ill. 340, 349, 60 N. E. Rep. 540.

[5] Mahaffey v. Beech Creek R., 163 Pa. 158, 29 Atl. Rep. 881. But see Haggard v. Independent School Dis-

been taken for public use, cannot have his damages increased on account of the loss of a gratuitous privilege which he has been enjoying by the sufferance of another.[1] Neither can he show as an element of damages an oral agreement of another than the condemning railroad company to build side tracks to connect with the land sought to be condemned, which cannot be carried out because of the appropriation of the land.[2] It has been held in Illinois and Kansas that the probability of damages from crossing a railroad, which runs through a farm, to teams and members of the owner's family is so uncertain as not to form a proper basis for consideration.[3] There are, however, cases in other states, and also in Illinois, which recognize such danger as an element of depreciation in the value of a farm.[4] The expense and inconvenience of removing personal property from land taken are not to be considered if there is no interference with business,[5] neither is the increased exposure of property to injury from evil-disposed persons,[6] nor the loss of a mere privilege granted by the railroad company, but not secured by contract.[7] In the absence of a statute giving littoral proprietors any rights in tide lands no allowance can be made therefor on the supposition that such rights may be granted.[8]

In an action to recover for damages sustained by changing the grade of a street it is not competent to show to what extent the traffic was thereby diverted from one side to the other, nor

trict, 113 Iowa, 486, 494, 85 N. W. Rep. 777, stated in § 1066.

[1] Hatch v. Cincinnati & I. R. Co., 18 Ohio St. 93; Ranlet v. Concord R. Corp., 62 N. H. 561; Clapp v. Boston, 133 Mass. 367.

[2] St. Louis, etc. R. Co. v. Clark, 121 Mo. 169, 200, 25 S. W. Rep. 192, 906.

[3] McReynolds v. Burlington, etc. R. Co., 106 Ill. 152; Conness v. Indiana, etc. R. Co., 193 id. 464, 62 N. E. Rep. 221; Southwestern Mineral R. Co. v. Harvey, 8 Kan. App. 489, 54 Pac. Rep. 806; St. Louis, etc. R. Co. v. Hammers, 51 Kan. 127, 32 Pac. Rep. 922.

[4] § 1066 *et seq.*

[5] Ranlet v. Concord R. Corp., 62 N. H. 561; Central Pacific R. Co. v. Pearson, 35 Cal. 247; In re New York, etc. R. Co., 35 Hun. 306, 633; Edmands v. Boston, 108 Mass. 535. But see Cook & Rathbone Co. v. Sanitary District of Chicago, 177 Ill. 599, 605, 52 N. E. Rep. 870; Becker v. Philadelphia & R. R., 177 Pa. 252, 35 Atl. Rep. 617, 35 L. R. A. 583.

[6] Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608, 5 Pac. Rep. 15; Ohio Southern R. Co. v. Snyder, 5 Ohio Dec. 480.

[7] Wabash, etc. R. Co. v. McDougall, 126 Ill. 111, 18 N. E. Rep. 291, 9 Am. St. 539, 1 L. R. A. 207.

[8] Bellingham Bay, etc. R. Co. v. Strand, 4 Wash. 311, 30 Pac. Rep. 144.

the number of trains which stopped at a station near the property in question before and after the change of grade.[1] Proof of the profits made in a business before it was affected by a public improvement and of the condition of the business thereafter is inadmissible as a ground for the recovery of damages.[2] It had been ruled in Massachusetts that there cannot be a recovery for temporary interruptions of business caused by the construction of a sewer in a highway, no new taking thereof being necessary.[3] This has been construed to mean such interruptions as would be incident to the construction of the sewer and common to all having occasion to use the street. It has been considered that in so ruling it was not intended to overrule cases holding that there may be a recovery for loss of business and earnings, and for rent which the petitioner was compelled to pay for other premises during or in consequence of the widening or alteration of a street,[4] and for damages occasioned to buildings by blasting.[5] "Such damages naturally would be quickly repaired, and therefore in a sense temporary, but no objection seems to have been made to their allowance on that ground. It would be going much further than any case has gone in this state to hold, where a statute provides, as is the case here, that all damages sustained by any person or corporation by the taking of his land shall be paid for, that damages to the remaining land from the destruction of crops and the drainage of wells in the construction of the work for which the land was taken cannot be recovered for because after the completion of the work the water returned to the soil and the wells as it was before, and the damage was therefore to be regarded as temporary. At common law it is no objection to recovery that the change may be temporary or quickly repaired, and we see nothing in the statute to prevent the petitioner from recovering for the loss of his crops and the

[1] Chicago v. Jackson, 88 Ill. App. 130, 196 Ill. 496, 63 N. E. Rep. 1013, 1135.

[2] Cobb v. Boston, 109 Mass. 309; Edmands v. Boston, 108 Mass. 535; Becker v. Philadelphia & R. R., *supra;* Sauer v. Mayor, 44 App. Div. 305, 60 N. Y. Supp. 648; Philadelphia Ball Club v. Philadelphia, 192 Pa. 632, 44 Atl. Rep. 265, 73 Am. St. 835. See § 1068.

[3] Lincoln v. Commonwealth, 164 Mass. 1, 10, 41 N. E. Rep. 112.

[4] Patterson v. Boston, 23 Pick. 425, 20 id. 159; Brooks v. Boston, 19 id. 174, 177.

[5] Brown v. Providence, etc. R., 5 Gray, 35.

damage caused by the draining of his wells and the diversion of the water. It is all special and peculiar to him, and the direct and natural result of the taking of his land and the construction of the sewer."[1] Business is not "property" within the meaning of a statute authorizing the recovery of compensation by any person whose property is taken under the right of eminent domain, or entered upon or injured.[2] Under a statute providing for the compensation of any one owning an established "business" which is injured in the exercise of the power of eminent domain, a physician, though he does part of his professional business outside his office, may recover damages measured by the actual decrease in value of his practice by the exercise of such right, regard being had to what he earned after abandoning his general practice and becoming a specialist.[3]

§ 1072. Same subject; expenditures to lessen loss. Where part of a tract of land is taken and its severance and the public use of it necessitates any new expenditure to protect or maintain the ordinary use of the residue, such expenditures or the necessity therefor is an element of damage. The owner has a right to recover the amount so expended or re- [443] quired to be expended on the ground that the value of his premises is diminished accordingly.[4] Thus, the necessity of maintaining fences along the line of a railroad is a recognized item of damage.[5] The recovery, however, will be limited to

[1] Penney v. Commonwealth, 173 Mass. 507, 35 N. E. Rep. 865; Bickford v. Hyde Park, 173 Mass. 552, 54 N. E. Rep. 250, 73 Am. St. 312. The last case was ruled under a statute allowing a recovery if the property should be injured in any manner.

[2] Sawyer v. Commonwealth, 182 Mass. 245, 65 N. E. Rep. 52.

[3] Earle v. Commonwealth, 180 Mass. 579, 63 N. E. Rep. 10.

[4] Commissioners v. Harkleroads, 62 Miss. 807.

[5] St. Louis, etc. R. Co. v. Anderson, 39 Ark. 167; Butte County v. Boydston, 64 Cal. 110, 29 Pac. Rep. 511; Stone v. Heath, 135 Mass. 561; White v. Foxborough, 151 id. 28, 23 N. E. Rep. 652; Board of Trade Tel. Co. v. Darst, 192 Ill. 47, 61 N. E. Rep. 398; Baltimore, etc. R. Co. v. Lansing, 52 Ind. 229; Montmorency Road v. Rock, 41 Ind. 264; White Valley, etc. R. Co. v. McClure, 29 Ind. 536; Tonica, etc. R. Co. v. Unsicker, 22 Ill. 221; Rock Island, etc. R. Co. v. Lynch, 23 Ill. 645; Bland v. Hixenbaugh, 39 Iowa, 532; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Winona, etc. R. Co. v. Waldron, 11 Minn. 515; Zeibold v. Foster, 118 Mo. 349, 24 S. W. Rep. 155; Shano v. Fifth Avenue & High Street Bridge Co., 189 Pa. 245, 42 Atl. Rep. 128, 69 Am. St. 808; Louisville, etc. R. Co. v. Barrett, 91 Ky. 487, 16 S. W. Rep. 278, holding

such fences[1] and such amounts therefor as are reasonably necessary. The amount expended to erect them is not the measure [444] of damages.[2] But where a railroad company taking lands for its road is required by law to fence it, or has already done so, nothing will be allowed as damages against it for building a fence,[3] for in the assessment of damages for property taken it is always assumed that the appropriation will be made according to law; that the property so appropriated will be used in a legal manner and that all legal obligations connected with such use will be fulfilled; and if the fact is or turns out otherwise another remedy is available and must be resorted to.[4] If, however, the fencing is not required to be

that the cost of fencing is a direct, and not a consequential, damage, and overruling Louisville, etc. R. Co. v. Glazebrook, 1 Bush, 325, on the latter point.

In Pennsylvania the cost of fencing is not recoverable as a distinct item, but it may be considered in so far as the necessity of it detracts from the value of the land. Curtin v. Nittany Valley R. Co., 135 Pa. 20, 19 Atl. Rep. 740; Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436, 1 Atl. Rep. 555; Pennsylvania R. Co. v. Bunnell, 81 Pa. 427.

This is the rule favored in Washington. Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. Rep. 720; Same v. Gilchrist, 4 Wash. 509, 30 Pac. Rep. 738. The cost of maintaining fences after their erection cannot be recovered for in condemnation proceedings under the California code. Los Angeles, etc. R. Co. v. Rumpp, 104 Cal. 20, 37 Pac. Rep. 859.

[1] Detroit v. Beecher, 75 Mich. 454, 466, 42 N. W. Rep. 986, 4 L. R. A. 813.

It is for the jury to say whether land is adapted to any purpose which makes the fencing of it profitable. Colusa County v. Hudson, 85 Cal. 633, 24 Pac. Rep. 791.

[2] Newgass v. Railway Co., 54 Ark. 140, 15 S. W. Rep. 188; Bland v. Hixenbaugh, 39 Iowa, 532; Milwaukee, etc. R. Co. v. Eble, 3 Pin. 334; Louisville, etc. R. Co. v. Glazebrook, 1 Bush, 325; Commissioners' Court v. Street, 116 Ala. 28, 36, 22 So. Rep. 629. But see North Eastern R. Co. v. Sineath, 8 Rich. 185, in which it appeared that a railroad had been laid through a large tract of land, to run partly through cultivated and partly through wood land; that on the latter cattle were kept. No allowance for fencing was made, though it was held that the company was not bound to fence its road, and it was shown that its trains had been very destructive of cattle, and it had latterly refused to pay for them.

[3] Id.; March v. Portsmouth, etc. R. Co., 19 N. H. 372; California Southern R. v. Southern Pacific R. Co., 67 Cal. 59, 7 Pac. Rep. 123; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. Rep. 581.

[4] Bangor, etc. R. Co. v. McComb, 60 Me. 290; Fleming v. Chicago, etc. R. Co., 34 Iowa, 353; Chicago, etc. R. Co. v. Springfield, etc. R. Co., 67 Ill. 142; Colcough v. Nashville, etc. R. Co., 2 Head, 171; Lyon v. Green Bay, etc. R. Co., 42 Wis. 543; Southside R. Co. v. Daniel, 20 Gratt. 344; St. Louis, etc. R. Co. v. North, 31 Mo. App. 345.

done until a certain time after the road is completed a jury may consider the damage to a farm which will probably result from the absence of fences.[1] Where the building of a telegraph line made the erection of a board fence necessary for the protection of animals, it was error to permit proof of the cost of renewing the fence every decade for a century.[2]

The probable injury to animals or damage which may otherwise result are not to be conjectured; but if, as the result of the appropriation of land, other land remains unfenced, and its value either in the maket or for the use to which it is devoted by the owner or to which it is adapted is depreciated, such depreciation is an element of damage in determining the compensation to be paid for land not taken.[3] If farm crossings will be necessary on a railroad, and the law does not impose upon the company the duty of their construction or maintenance, the want thereof, or any expense necessary to be incurred by the owner to secure such a convenience, or to [**445**] lessen the injury from its absence, may be considered on the question of damages.[4] The expense of erecting and maintaining a retaining wall for the protection of property adjacent to railroad excavations may be allowed in addition to other damages; and it will not be prevented by tender of a stipulation of the condemning party to erect and keep up such a wall.[5] But if the liability of the property owner for subsequent expense is conditional, as where it depends upon the action of the public authorities in the exercise of their power to require sidewalks to be laid on a newly opened street, one-half of the

[1] St. Louis, etc. R. Co. v. Kirby, 104 Ill. 345; Centralia & C. R. Co. v. Rixman, 121 id. 214, 12 N. E. Rep. 685.

[2] Board of Trade Tel. Co. v. Darst, *supra*.

[3] Centralia & C. R. Co. v. Brake, 125 Ill. 393, 17 N. E. Rep. 820.

[4] Peoria, etc. R. Co. v. Sawyer, 71 Ill. 361; Atchison & N. R. Co. v. Gough, 29 Kan. 94; Heilman v. Lebanon & A. Street R. Co., 175 Pa. 188, 34 Atl. Rep. 647.

If such crossings are voluntarily constructed or are part of the plan of a railroad as shown on the map and profile thereof, and are considered by the commissioners in making their award, the court and jury on appeal therefrom should assess the damages with reference to the plan because the company is bound by it to construct such crossings. Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608, 5 Pac. Rep. 15.

[5] Thompson v. Milwaukee, etc. R. Co., 27 Wis. 93; Commonwealth v. Boston, etc. R. Co., 3 Cush. 25. *Contra*, Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415.

cost of which he is chargeable with, such expense is not an element of damage.[1] It is all the owner has a right to do to prove the cost of making the walk and "recover any damages for the diminished value of the remaining land which might have been shown to have been occasioned by the probability that a sidewalk would afterwards be built, involving expense to the owner in the erection or care of it. . . . If the liability thereafter to build and keep clean a sidewalk in the street as laid out did not depreciate the value of his remaining land there is no reason why he should recover, as an independent element of damages when his land was taken, the amount subsequently assessed upon him for the cost of such sidewalk or the expense he might incur in its care."[2] It is presumed that, as a general rule, the condemning party is not liable for the counsel fees of the other;[3] but where condemnation proceedings have been abandoned, on their reinstatement such fees, incurred in the original proceeding, have been held an element of the damages.[4] In Pennsylvania all such matters as the foregoing may be considered for the sole purpose of ascertaining the market value of the property before it was taken and unaffected by the taking and such value as affected by it.[5]

§ 1073. Same subject. Where one railroad company acquired, by condemnation, the right to run its road through a high embankment of another, and on a grade twenty feet below its track, it was under no obligation to erect or maintain a bridge to support the track of such other company, and, therefore, proof of what it would cost to build such bridge and keep the same in repair was not deemed proper in the assessment of damages. The company whose property was thus invaded was entitled to have such sum for damages as would enable it to construct and keep in repair all such works as should be necessary to maintain its track in a safe and secure condition, and also for all resulting incidental loss and inconvenience.[6] If a building must be removed in consequence of

[1] Cushing v. Boston, 144 Mass. 317, 11 N. E. Rep. 93; Detroit v. Beecher, 75 Mich. 454, 466, 42 N. W. Rep. 986, 4 L. R. A. 813.

[2] Cushing v. Boston, *supra.*

[3] See § 1063.

[4] Gibbons v. Missouri Pacific R. Co., 40 Mo. App. 146. See Minneapolis & N. R. Co. v. Woodworth, 32 Minn. 452, 21 N. W. Rep. 476.

[5] Chambers v. South Chester, 140 Pa. 510, 41 Atl. Rep. 409.

[6] Chicago, etc. R. Co. v. Springfield, etc. R. Co., 67 Ill. 142, 96 id. 274; Lake

the taking of the land on which it stands, the expense of the removal will be included in the damages, and also the value of the right, if any exists, to have the house remain on the land until such right would expire.[1] Expenditures necessary to restore structures upon adjacent premises to their former condition, relatively, may also be considered,[2] as well as loss of time in such removal.[3] In the assessment of damages allowed for laying out a highway at a grade below an adjoining house and land, the cost of cutting down the land and of building a basement under the house, with a door and interior ascent to the house, is an admissible element if such alterations are found to be the most reasonable and economical means of restoring the estate to its former value. The damages in such a case are not confined to the injury caused to the right [446] of lateral support of the soil exclusive of the building, but include all the damage to the property.[4] If only a part of a building is on the right of way sought to be taken, another part being on land previously condemned by another railroad company, the remainder of the building being on land owned by the defendant, the allowance of damages should be made without regard to the part previously condemned or for the injury done to the remainder by the first taking.[5] In a Massachusetts case involving the damages due a land-owner for taking an easement in his land for sewerage purposes, he being entitled to recover for the value of the land taken and the injury to the part not taken, it was ruled that it was competent for him to show the reasonable cost of any necessary adaptation of his land to the new state of things produced by the public work for which the land had been taken, the adaptation and cost being proper, having reference also to the market

Erie & W. R. Co. v. Commissioners of Hancock County, 63 Ohio St. 23, 57 N. E. Rep. 1009.

[1] Tufts v. Charlestown, 4 Gray, 537; White v. Foxborough, 151 Mass. 28, 23 N. E. Rep. 652; Benton v. Brookline, 151 Mass. 250, 23 N. E. Rep. 846; Mangles v. Chosen Freeholders, 55 N. J. L. 88, 25 Atl. Rep. 322; Grugan v. Philadelphia, 158 Pa. 337, 346, 27 Atl. Rep. 1000.

[2] Chase v. Worcester, 108 Mass. 60; Hyde v. Middlesex, 2 Gray, 267; White v. Foxborough, *supra;* Cummins v. Des Moines, etc. R. Co., 63 Iowa, 397, 19 N. W. Rep. 268.

[3] Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582.

[4] Hartshorn v. Worcester, 113 Mass. 111.

[5] Missouri Pacific R. Co. v. Porter, 112 Mo. 361, 372, 20 S. W. Rep. 568.

value of his estate; and that when such damages are to be assessed, if it is contended by the condemning party that they are offset in whole or in part by some special and peculiar benefit resulting to the property by the improvement, the fair and reasonable cost to the owner of making that benefit practically available is to be considered in ascertaining the amount of special and peculiar benefit to be offset.[1]

§ 1074. Basis for estimating value of land. In ascertaining the damages to an owner for taking his land or a part of it for a public use its value should not be limited by estimates exclusively for any particular purpose. The jury are to consider its market value before and after the alleged injury, and in doing this everything which gives it intrinsic value is to be taken into consideration, and its capabilities for any particular use to which it may be put;[2] they may take into account all

[1] Butchers' Slaughtering & Melting Ass'n v. Commonwealth, 163 Mass. 386, 40 N. E. Rep. 176.

[2] Reiber v. Butler & P. R. Co., 201 Pa. 49, 50 Atl. Rep. 311; Lough v. Minneapolis, etc. R. Co., 116 Iowa, 31, 89 N. W. Rep. 76; Young v. Harrison, 17 Ga. 30; Shenango, etc. R. Co. v. Braham, 79 Pa. 447; Dwight v. Hampden, 11 Cush. 201; Dickenson v. Fitchburg, 13 Gray, 546; Colville v. St. Paul, etc. R. Co., 19 Minn. 283; Carter v. Same, 22 Minn. 342; White v. Charlotte, etc. R. Co., 6 Rich. 47; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Matter of Furman Street, 17 Wend. 649; Burt v. Wigglesworth, 117 Mass. 302; Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 495; Regina v. Brown, 36 L. J. (Q. B.) 322; Little Rock, etc. R. v. McGehee, 41 Ark. 202; Little Rock Junction R. v. Woodruff, 49 id. 381, 5 S. W. Rep. 792, 4 Am. St. 51; Muller v. Southern Pacific Branch R. Co., 83 Cal. 240, 23 Pac. Rep. 265; Johnson v. Freeport, etc. R. Co., 111 Ill. 413; Chicago & E. R. Co. v. Blake, 116 id. 163, 4 N. E. Rep. 488; Hyde Park v. Washington Ice Co., 117 Ill. 233, 7 N. E. Rep. 523; Calumet River R. Co. v. Moore, 124 Ill. 329, 15 N. E. Rep. 764; Moulton v. Newburyport Water Co., 137 Mass. 163; Cedar Rapids, etc. R. Co. v. Ryan, 37 Minn. 38, 33 N. W. Rep. 6; Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. Rep. 641; Pittsburgh & W. R. Co. v. Patterson, 107 Pa. 461; Alloway v. Nashville, 88 Tenn. 511, 13 S. W. Rep. 123, 8 L. R. A. 123; Stinson v. Chicago, etc. R. Co., 27 Minn. 284, 6 N. W. Rep. 784; Shenandoah Valley R. Co. v. Shepherd, 26 W. Va. 672; Watson v. Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. Rep. 468; Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415; Great Falls Manuf. Co. v. United States, 18 Ct. of Cls. 160, 193; Harris v. Schuylkill, etc. R. Co., 141 Pa. 242, 21 Atl. Rep. 590, 23 Am. St. 278; West Chicago Street R. Co. v. Chicago, 172 Ill. 198, 50 N. E. Rep. 185; Ligare v. Chicago, etc. R. Co., 166 Ill. 249, 46 N. E. Rep. 803; Colorado M. R. Co. v. Brown, 15 Colo. 193, 25 Pac. Rep. 87; Hercules Iron Works v. Elgin, etc. R. Co., 141 Ill. 491, 30 N. E. Rep. 1050; Snouffer v. Chicago, etc. R. Co., 105 Iowa, 681, 75 N. W. Rep. 501; Union Terminal R. Co. v. Peet Brothers Manuf. Co., 58 Kan. 197, 48 Pac. Rep. 860; Maynard v. Northampton, 157

the uses and capabilities to which the property was adapted at the time it was taken or to which it might be applied.[1] If land taken has a mine under its surface that fact may be considered if it adds to the market value of the land, even though the mine has never been worked; so of a water-power which is unutilized.[2] The owner may have damages for being prevented from removing minerals under the right of way.[3] The jury, however, is not at liberty to make a special allowance for the value of unopened mines; their existence is only material so far as they affect the market price of the property.[4] In Illinois it is the rule that while witnesses may take into

Mass. 218, 31 N. E. Rep. 1062; Fales v. Easthampton, 162 Mass. 422, 38 N. E. Rep. 1129; Miller v. Windsor Water Co., 148 Pa. 429, 23 Atl. Rep. 1132; McKinney v. Nashville, 102 Tenn. 131, 52 S. W. Rep. 781, 73 Am. St. 859; Harwood v. West Randolph, 64 Vt. 41, 24 Atl. Rep. 97; Trent-Stoughton v. Barbados Water Supply Co., [1893] App. Cas. 502; Cochrane v. Commonwealth, 175 Mass. 299, 56 N. E. Rep. 610; Webster v. Kansas City, etc. R. Co., 116 Mo. 114, 22 S. W. Rep. 474; St. Louis Terminal R. Co. v. Heiger, 139 Mo. 315, 40 S. W. Rep. 947; Wilson v. Equitable Gas Co., 152 Pa. 566, 25 Atl. Rep. 635.

[1] Fosgate v. Hudson, 178 Mass. 225, 59 N. E. Rep. 809.

[2] Haslam v. Galena R. Co., 64 Ill. 353; Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. Rep. 641; Louisville, etc. R. Co. v. Ryan, 64 Miss. 399, 8 So. Rep. 173; Chicago, etc. R. Co. v. Catholic Bishop, 119 Ill. 525, 10 N. E. Rep. 372; Little Rock Junction R. v. Woodruff, 49 Ark. 381, 5 S. W. Rep. 792, 4 Am. St. 51; Frick Coal Co. v. Painter, 198 Pa. 468, 485, 48 Atl. Rep. 302.

Where part of the water of a stream was taken and a mill owner on the stream below sought to recover damages, it was held erroneous to award them on the basis of the use which might have been made of the water. Its actual value to him measured his right. Lee v. Springfield Water Co., 176 Pa. 223, 35 Atl. Rep. 184.

If the proper exercise of the franchise of a water company which takes water from a stream requires the storing of the water during the day and its use during the night, and such storing is injurious to the plaintiff's property, that fact may be considered in determining the actual difference in the value of the property caused by taking the water. Lewis v. Springfield Water Co., 176 Pa. 230, 35 Atl. Rep. 186.

[3] Barnsley Canal Co. v. Turbill, 13 L. J. (Ch.) 406; Proud v. Bates, 34 L. J. (Ch.) 406; Fletcher v. Great Western R. Co., 29 L. J. (Ex.) 253.

[4] Searle v. Lackawanna, etc. R. Co., 33 Pa. 57; Daly v. Smith, 18 App. Div. 194, 45 N. Y. Supp. 785; Davis v. Jefferson Gas Co., 147 Pa. 130, 23 Atl. Rep. 218; Sanitary District of Chicago v. Loughran, 160 Ill. 362, 43 N. E. Rep. 359.

In Twin Lakes H. G. Min. Synd. v. Colorado M. R. Co., 16 Colo. 1, 4, 27 Pac. Rep. 258, an instruction to the effect that if the jury believed that the presence of gold enhanced either the market value or the intrinsic value of the land they should give due weight to that fact, was approved.

consideration any use to which they believe the property may be profitably put, "yet the jury are not bound to base their verdict upon the supposition that it would be appropriated to a use other than that to which it is now devoted."[1] Conceding that the condemning party may release its right to subjacent support and absolve itself from liability for the increased value of the land resulting from the mineral, it cannot thereby absolve itself from liability for the consequences of a subsidence of the soil, and these may be regarded in fixing the value of the land in a proper case.[2] If land is valuable both as a mine and as town lots the owner is not bound to elect whether he will prove its value for the one use or the other. Such uses do not interfere with each other, and together they go to show the market value of the land. In estimating the compensation due from a railroad company, it must be borne in mind that it takes only the easement of the surface of the ground and does not take the owner's right to remove minerals if he can remove them without interference with such easement.[3]

The rule for estimating the value of the property taken or which is sought to be taken has been expressed in various ways. Thus, it has been said that any existing facts which enter into the value of land, in the public and general estimation, and tend to influence the minds of sellers and buyers, may be considered.[4] Compensation may be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.[5]

[1] Phillips v. Scales Mound, 195 Ill. 353, 362, 63 N. E. Rep. 180; Snodgrass v. Chicago, 152 Ill. 600, 38 N. E. Rep. 790.

[2] Davis v. Jefferson Gas Co., 147 Pa. 130, 23 Atl. Rep. 218. See Wallace v. Same, 147 Pa. 205, 23 Atl. Rep. 416.

[3] Northern Pacific & M. R. Co. v. Forbis, 15 Mont. 452, 39 Pac. Rep. 571, 48 Am. St. 692.

[4] Russell v. St. Paul, etc. R. Co., 33 Minn. 210, 22 N. W. Rep. 379; Duluth & W. R. Co. v. West, 51 Minn. 163, 53 N. W. Rep. 197.

[5] Boom Co. v. Patterson, 98 U. S. 403; Amoskeag Manuf. Co. v. Worcester, 60 N. H. 522; Portland & R. R. Co. v. Deering, 78 Me. 61, 2 Atl. Rep. 670, 57 Am. Rep. 784; Ohio Valley R. & T. Co. v. Kerth, 130 Ind. 314, 30 N. E. Rep. 298; West Virginia, etc. R. Co. v. Gibson, 94 Ky. 234, 21 S. W. Rep. 1055; Richmond & M. R. Co. v. Humphreys, 90 Va. 425, 18 S. E. Rep. 901; Rock Island & P. R. Co. v. Leisy Brewing Co., 174 Ill. 547, 51 N. E. Rep. 572.

It is to be fixed upon a fair consideration of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve may be regarded as the market value of the land.[1] If the owner has adopted a peculiar mode of using the land taken or injured by which he derives profit from it, he must be compensated for its loss or damage on the basis of its value for such use. "It is the value which he has," said the court, where a training-track was crossed by a railroad, "and of which he is deprived, which must be made good by compensation."[2] Damages are not to be awarded on the expectation of future profits of an established business nor on the profits of a business which might be established on the land, which was adapted to a business use.[3] But "the probable returns from an investment in land because of the use which may be made of it is a consideration which enters into an intelligent estimate of its value, and is entirely distinct from an estimate based on the profits of a business which may be conducted on it."[4] Where land taken had been used for market gardening it was held proper to show the value of the fertilizers put upon it.[5] If grading has been done on land

[1] Clark, J., in Pittsburgh, etc. R. Co. v. Vance, 115 Pa. 325, 331, 8 Atl. Rep. 764; Hall v. State, 72 App. Div. 360, 77 N. Y. Supp. 282.

[2] St. Louis, etc. R. Co. v. Kirby, 104 Ill. 345.

In such a case it is erroneous to assess damages on the theory that the destruction of the track involves the loss of business of raising stock on the farm and of the stock already there. The correct basis is said to be the cost of making another track on the premises which are not affected by the road. In re New York, etc. R. Co., 29 Hun, 1.

If land is damaged for church uses the compensation should be measured accordingly. Durham & N. R. v. Trustees of Bullock Church, 104 N. C. 525, 10 S. E. Rep. 761.

If the use of the condemned property for gambling inflated the rental value of it the rent paid cannot be considered as constituting a part of the rental value of the land so far as the rent was inflated by such use. Though it may be difficult to fix the rental value from a legitimate use, that is the misfortune of the owner. McKinney v. Nashville, 102 Tenn. 131, 52 S. W. Rep. 781.

[3] Hamilton v. Pittsburgh, etc. R. Co., 190 Pa. 51, 42 Atl. Rep. 389.

[4] Gearhart v. Clear Spring Water Co., 202 Pa. 292, 51 Atl. Rep. 891.

[5] Chicago & E. R. Co. v. Jacobs, 110 Ill. 414.

which is desired by a railroad company and abandoned by the party who did it the land-owner may show its value.[1] But the cost of making such a grade or the benefit which it may be to the railroad company is not the proper measure of compensation. The consideration is the exact market value of the land upon which the grading has been done for whatever purpose the land might or could be used. If the grade can be used for railroad purposes and the land is more valuable for such purposes than for any other, its enhanced value to a railroad company should be regarded.[2] If the owner is restricted by statute or the conveyance under which he holds, or in any other binding way, to a particular use of his land, the compensation due him will be measured by its value for any use to which he might apply it.[3] If a future possible use depends upon the volition of a third person over whose action the land-owner has no control, such use must not enter into the estimate.[4] A tendency to limit this rule is manifested in a late Massachusetts case. The action was to recover damages caused by taking the petitioner's flats, and he testified as to the best plan to develop and get the most out of them. There existed a restriction upon his right to use them, and for this reason the evidence was objected to. The court observed, by Holmes, J.: It is said that the flats in question were subject to an easement which prevented their being built upon, and that the petitioner had no license to build upon them as required by law apart from the alleged easement, and therefore that the question was misleading. Assuming the facts to be as supposed, still the propriety of allowing the question would depend upon the particular circumstances of the case. The test is whether the answer would be likely to help the jury to estimate the value of the land. The mere existence of an incumbrance is not technically and necessarily a bar. For instance, if it was manifestly the interest of the owners of the dock and of the public that the dock should be filled up, and

[1] De Boul v. Freeport, etc. R. Co., 111 Ill. 499.

[2] Cohen v. St. Louis, etc. R. Co., 34 Kan. 158, 8 Pac. Rep. 138, 55 Am. Rep. 242.

[3] In re Albany Street, 11 Wend. 149; Stebbing v. Metropolitan Board, 6 Q. B. 37; Allen v. Boston, 137 Mass. 319.

[4] Munkwitz v. Chicago, etc. R. Co., 64 Wis. 403, 25 N. W. Rep. 438.

therefore it was to be expected that when the time came the owners would release their mutual easement and the authorities would grant a license, the evidence would be very nearly as instructive as if the owner was free to build at once. Other cases could be imagined in which a jury could be trusted to allow for the restriction in considering such testimony as they would allow for it in rendering their verdict.[1] The question went to the verge, but we cannot say that it was wrong to admit it.[2]

It has been ruled in Iowa and Pennsylvania in cases in which evidence was offered to show how many residence lots are ordinarily contained in an acre of land and what such lots would probably sell for on the land in question, that such evidence was improper. "The question was what was" the land "worth in the condition it then was, and not what its prospective value was, or what it would be if it had been laid out into city lots."[3] The weight of authority favors the opposing view,[4] and in harmony therewith is a later case in Iowa. Witnesses who testified as to the value of a lot were permitted to take into consideration the prospective location of a depot thereon by the companies which were condemning the property. In sustaining the admission of such testimony the court said: Many of the considerations that tend to affect the value of town property are prospective only. Select a lot in any city, find a witness competent to express an opinion as to its value, and ask him with relation thereto, and as to the basis of his judgment, and it will be found that the facts upon which his conclusions rest are anticipatory, largely. The business district is growing or extending towards it, or it is in a section that is rapidly improving. These are proper matters to consider, and they all relate, in most part, to future prospects.[5] In a Kansas case the plans of the land-owner for the future

[1] Citing Allen v. Boston, 137 Mass. 319.

[2] Blaney v. Salem, 160 Mass. 303, 35 N. E. Rep. 858.

[3] Everett v. Union Pacific R. Co., 59 Iowa, 243, 13 N. W. Rep. 109; Reiber v. Butler & P. R. Co., 201 Pa. 49, 50 Atl. Rep. 311.

[4] Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. Rep. 557; Cahill v. Norwood Park, 149 Ill. 156, 36 N. E. Rep. 606; Chicago, etc. R. Co. v. Davidson, 49 Kan. 589, 31 Pac. Rep. 131.

[5] Snouffer v. Chicago, etc. R. Co., 105 Iowa, 681, 75 N. W. Rep. 501. Compare Ohio Southern R. Co. v. Snyder, 5 Ohio Dec. 480, 486.

use of the land condemned were received in evidence without substantial error, the damages being measured by the effect of the improvement upon the value of the land.[1] If the land taken is situated on the public street of a city the owner may prove its value if it should be laid out in lots in the near future.[2] But if it were a piece of vacant land lying in the open country as part of a farm, with no indications of its being marketable as town lots, the objection to such proof would probably prevail.[3] The owner of a farm adjacent to a village may recover as damages for the taking of the water of a brook running through it not merely what it is worth for farm purposes, but its value in view of the fact that the land is available for building lots and the water for supplying buildings which may be erected thereon.[4]

Where a gas plant located upon the part of the land taken had not been used for several years before the taking, but was

[1] Union Terminal R. Co. v. Peet Brothers Manuf. Co., 58 Kan. 197, 48 Pac. Rep. 860.

The fact that provision has been made by law for bringing land within the limits of a city may be considered in fixing its value. Duluth & W. R. Co. v. West, 51 Minn. 163, 53 N. W. Rep. 197.

Where tenants in common made a plan of their land showing lots, streets and alleys and agreed to a partition among themselves, but before the deeds were executed and the plan was recorded an incline plane company entered upon the land to construct its works, the owners were entitled to claim damages for the land taken, and also for the appropriation of ways or easements appurtenant to the land; but the streets laid down on the plan, not opened or accepted by the public, could not be considered as actual streets. It was competent for the owners to offer the plan as evidence of the capacity of the land for improvement in a certain way; and for the company to give evidence of an equally advantageous use in a different way with which the incline would not interfere or which it might aid. Phillips v. St. Clair Incline Plane Co., 166 Pa. 21, 31 Atl. Rep. 69.

[2] O'Brien v. Schenley Park & H. Co., 194 Pa. 336, 45 Atl. Rep. 89; Alexian Brothers v. Oshkosh, 95 Wis. 221, 70 N. W. Rep. 162; Walker v. South Chester R. Co., 174 Pa. 288, 34 Atl. Rep. 560.

[3] O'Brien v. Schenley Park & H. R. Co., *supra*.

The mere hopes of a land-owner that his field may one day be built upon as city lots are not to be considered unless the probability of such an event, in the public mind, has in fact affected the fair marketable value of the land at the time of the proceeding. New York, etc. R. Co. v. Arnot, 27 Hun, 151; Daly v. Smith, 18 App. Div. 194, 45 N. Y. Supp. 785. See Ohio Valley R. & T. Co. v. Kerth, 130 Ind. 314, 30 N. E. Rep. 298.

[4] Bridgeman v. Hardwick, 67 Vt. 653, 32 Atl. Rep. 502.

kept in condition to be used, and the business of the owner required it, as a matter of business prudence, to maintain the plant as a reserve plant, he was entitled to recover damages for its taking as a going concern.[1] In fixing the value of a toll bridge the superstructure, substructure, approaches and franchise are to be considered, as is the amount of the net earnings; but the fact that part of the net receipts were used for a special purpose is immaterial.[2] Evidence of the original cost of the bridge, while admissible, is not controlling on the question of value. The life of the franchise is a proper subject of inquiry.[3] The good-will of a business cannot be considered in estimating the value of land.[4] If riparian proprietors on the outlet of a lake, who have mills and factories thereon, have no title to the water therein or right to divert or sell it, their right being limited to the use of the water for mill purposes, they cannot recover on the basis of the value of the water, but on the basis of the difference in value of their property with and without the rights condemned.[5]

In Maine it is provided by statute that "when buildings or fences have existed more than twenty years fronting upon any way, street, lane or land appropriated for public use, the bounds of which cannot be made certain by any records or monuments, such buildings or fences shall be deemed the true bounds thereof." In ascertaining the quantity of land taken by a city when it orders such a building moved back from its location the measurement will be commenced on a line with the side of the main building, and not on a line with the cornice on its gable end.[6] But in Massachusetts it has been held where a deed described one of the boundaries of land as four feet from the side of a building the extremest part, the edge of the eaves, was meant.[7]

[1] Matter of the Mayor, 39 App. Div. 589, 57 N. Y. Supp. 657.

[2] Clarion Turnpike & Bridge Co. v. Clarion County, 172 Pa. 243, 33 Atl. Rep. 580; West Chester & W. Plank Road Co. v. Chester County, 182 Pa. 40, 37 Atl. Rep. 905.

[3] West Chester & W. Plank Road Co. v. Chester County, *supra*.

[4] Condemnation of Property on Race Street, 9 Pa. Dist. Rep. 615; Edmands v. Boston, 108 Mass. 536; In re New York, etc. R. Co., 35 Hun, 633.

[5] Syracuse v. Stacey, 169 N. Y. 231, 62 N. E. Rep. 354.

[6] Farnsworth v. Rockland, 83 Me. 508, 22 Atl. Rep. 394.

[7] Millett v. Fowle, 8 Cush. 150.

§ 1075. Same subject; value for special purpose. The general rule that the value of property taken is not to be based upon its adaptability for a special purpose is not uniformly adhered to, and seems to have been departed from in California, notwithstanding earlier cases to the contrary.[1] The property in question had no general market value, but was valuable in connection with the adjoining land of the condemning party for reservoir purposes. Its worth for such purposes was held to be the measure of its value.[2] In a subsequent case a highway was laid through land on which the owner had constructed a private road. The trial court excluded all evidence concerning the value of such road, and directed the jury to appraise the land as though no road was upon it. This was properly enough held erroneous; but the appellate court went so far as to make the value of the road to the condemning party the measure of compensation. "If a man had constructed a bridge across a stream on his own land and for his private use, and if the county should lay out a highway to cross on that bridge it would scarcely be contended that the county could condemn the bridge for public use without paying its reasonable value. We do not see that there is any distinction in principle between the bridge in the case supposed and the defendant's graded road in this case. The grade is there. It must have cost something and is no doubt of some value. The county proposed to take it and use it as a part of the highway. If its existence will make the construction of the highway any less expensive the county will get the benefit and ought to pay the value. The fact that defendant will have a public way in place of his private road is no answer to this proposition. In so far as the highway is a benefit to him he is chargeable, and has been charged, with the value of the benefit. If he contributed to the construction of the road an improvement in the shape of a mile or more of grading he is entitled to the value of that improvement."[3] A more recent case recognizes the rule that the present market value of land — the price obtainable for it

[1] Gilmer v. Lime Point, 19 Cal. 47; Central Pacific R. Co. v. Pearson, 35 id. 247.

[2] San Diego Land & T. Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372, approved in Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 457, 30 Pac. Rep. 720.

[3] Colusa County v. Hudson, 85 Cal. 633, 24 Pac. Rep. 791.

after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property — is the measure of damages, and not its value in use to the owner or to the party seeking to condemn it. "The peculiar fitness of land for particular purposes is an element in estimating its value which may be shown, and, when it appears, forms a factor in solving the problem of market value." [1] And in a later case it is said that there is nothing in the Neale case indicating a different rule.[2] The law in Louisiana is in harmony with the earlier California case noted.[3] A majority of the judges of the Pennsylvania superior court have ruled that on the taking of a private sewer damages may be awarded on the theory that the materials of which the sewer was composed were appropriated, and that the damages might be assessed on the basis of their cost less the benefits accruing to the property in which the sewer was laid by reason of the appropriation.[4] While the value of the property to the party who desires it is not the measure of the owner's right,[5] the latter is entitled to recover the sum it would have brought him, though that was increased by any special value it had for any cause.[6] The view of the California court in the reservoir case is in direct issue with a recent Tennessee ruling,[7] a late case in New York,[8] Pennsylvania[9] and Maine.[10] No account can be taken of the

[1] Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. Rep. 224, citing San Diego Land & T. Co. v. Neale, *supra*, and Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. Rep. 681.

[2] Kishlar v. Southern Pacific R. Co., 134 Cal. 636, 66 Pac. Rep. 848.

[3] Orleans & J. R. Co. v. Jefferson, etc. R. Co., 51 La. Ann. 1605, 1614, 26 So. Rep. 278, and local cases cited in the opinion.

[4] Hays v. South Easton Borough, 10 Pa. Super. Ct. 390.

[5] Lehigh Coal Co. v. Wilkes-Barre & E. R. Co., 187 Pa. 145, 41 Atl. Rep. 37.

[6] Hercules Iron Works v. Elgin, etc. R. Co., 141 Ill. 491, 30 N. E. Rep. 1050; Cahill v. Norwood Park, 149 Ill. 156, 36 N. E. Rep. 606; Snodgrass v. Chicago, 152 Ill. 600, 38 N. E. Rep. 790; In re New York, etc. R. Co., 27 Hun, 116; Matter of Gilroy, 85 Hun, 424, 32 N. Y. Supp. 891; Matter of Daly, 72 App. Div. 394, 76 N. Y. Supp. 28. See Black River & M. R. Co. v. Barnard, 9 Hun, 104; In re Boston, etc. R. Co., 22 id. 176.

[7] Alloway v. Nashville, 88 Tenn. 510, 8 L. R. A. 123, 13 S. W. Rep. 123; McKinney v. Nashville, 102 Tenn. 131, 52 S. W. Rep. 781. See Watson v. Milwaukee & M. R. Co., 57 Wis. 332, 355, 15 N. W. Rep. 468; Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415; Goodwine v. Evans, 134 Ind. 262, 33 N. E. Rep. 1031; Siedler v. Seely, 8 Colo. App. 499, 46 Pac. Rep. 848.

[8] Matter of Daly, 72 App. Div. 394, 76 N. Y. Supp. 628.

[9] Chambersburg & B. Turnpike Road, 20 Pa. Super. Ct. 173.

[10] Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. Rep. 6.

value of land with a certain improvement upon it if that cannot be made without damaging the land of others.[1] In a few other cases than those referred to the value of land taken has been estimated with reference to the use for which it was condemned.[2] But there are as cogent reasons in opposition to this theory. Bellinger, J., said, in considering such a claim: If, in condemning land for a bridge site, its "availability" as such site is a measure of value to be paid the owner,[3] there is involved a consideration of the importance of the particular place to the intended use. In other words, the availability of the site is measured by the importance of the use, and in a matter of the greatest public concern a value so measured may be inestimable, and so the supreme necessity of the country to build defenses against its enemies becomes a measure of value to be paid the owner whose land is taken for that purpose. The claim that the extent of the private interest to be taken is to include, in addition to all the uses available to the owner, the value, if that is possible of ascertainment, of the public interest to be served, is, in my opinion, without equity and against public policy. . . . The owner cannot avail himself of the adaptability of these lands to a boat-railway line to enhance his recovery. The character and magnitude of such an undertaking, as a practical matter, takes it out of the field of private enterprise, if it is one in which such enterprise is authorized by law to engage. It is necessarily, therefore, a great public work, and must, so far as the question under consideration is concerned, be assumed to be within the exclusive province of the government. The owner of the lands condemned is wholly precluded by these conditions from the use which the government seeks to make of them. That use is in no way available to him. It is not a property right in him, and adds nothing to the value of which his lands are possessed, or to the advantages of which he will be deprived by the proposed appropriation. He is entitled to the full value of his land considered with reference to all the uses, present and prospective, which he can or has the right to make of it; but the necessity of the

[1] Burke v. Sanitary District of Chicago, 152 Ill. 125, 38 N. E. Rep. 670.

[2] Young v. Harrison, 17 Ga. 30; Snouffer v. Chicago, etc. R. Co., 105 Iowa, 681, 75 N. W. Rep. 501.

[3] Referring to Young v. Harrison, *supra*.

government cannot be made a measure of his compensation.[1] If the owner of land taken seeks to recover its value for a special use he cannot also recover such sum as the testimony showed the taking had damaged the remainder of his land. By claiming compensation on the basis of the value of the land for the special use the owner sets apart the tract as to which he makes such claim from the remainder of his land by devoting it to a purpose distinct from and foreign to that for which the remainder is used.[2]

§ 1076. Compensation for wrong-doer's improvements. The numerous exceptions to the common-law rule that everything attached to the realty by one who had no right to the latter became part of it have been extended in recent times upon grounds of public policy so far as railroad companies are concerned. An entry by them in advance of the acquirement of the right to make it is not unlawful in the same sense as such an entry by an individual or a corporation which is not invested with the power of eminent domain.[3] Hence, if such a company enters upon land with the consent of the life tenant or the person who appears to own it and erects a depot or

[1] United States v. Seufert Bros. Co., 78 Fed. Rep. 520; United States v. Taffe, id. 524.

[2] Cameron v. Chicago, etc. R. Co., 51 Minn. 153, 53 N. W. Rep. 199. It was said by Collins, J.: If the land under consideration was of greater value as a gravel pit, or, to illustrate, for an elevator or hotel site, than it was for agricultural purposes, the owner could so insist when the railway company attempted its appropriation. But this increased value attached solely because the tract was adapted to and capable of separate and independent use, and this use contemplated and required its segregation from the balance of the farm — its appropriation to an extraneous, more desirable, and hence more valuable purpose. If by using the eight and a half acres as a gravel pit, or as a building site — other than for farm buildings — its value could be augmented, the respondent's compensation would be correspondingly increased, because it was his right to have his damages assessed on that basis; but he cannot be permitted to treat it as a separate and disconnected tract of land exclusively devoted to a special use and purpose distinct from farming, and at the same time regard it as part of his farm — as still connected with his adjacent farming lands. Assessing the damages by taking the value of the entire tract as a gravel pit, which of course assumed its separation from the remainder of respondent's land, and also assessing the damages by reason of its separation, was to some extent duplicating the damages.

[3] Jones v. New Orleans & S. R. Co., 70 Ala. 227; Justice v. Nesquehoning Valley R. Co., 87 Pa. 28; Oregon R. & N. Co. v. Mosier, 14 Ore. 519, 13 Pac. Rep. 300, 58 Am. Rep. 321.

other structure thereon without injuring the inheritance, the remainder-man or legal owner cannot, in a subsequently instituted proceeding for the condemnation of the property, recover the value of such improvements.[1] This is the rule where the entry is made without license.[2] If the land-owner is authorized to institute proceedings, by doing so he ratifies the selection made and elects to take pay for the land used and for the damage done to that not taken. The value and damages are assessable as of the time possession was first taken.[3] These principles have no application where there is no authority to condemn the lands entered upon and improved,[4] and are not recognized in New York.[5]

In a Virginia case where a railroad company, unauthorizedly, made expensive improvements on land, became insolvent and its franchise and property were purchased by another company, the land-owner was entitled to recover the value of the land, with the improvements, from the purchaser.[6] The general

[1] Chicago & A. R. Co. v. Goodwin, 111 Ill. 273, 53 Am. Rep. 622; St. Johnsbury, etc. R. Co. v. Willard, 61 Vt. 134, 17 Atl. Rep. 38, 15 Am. St. 886, 21 L. R. A. 528; Ellis v. Rock Island, etc. R. Co., 125 Ill. 82, 17 N. E. Rep. 62; Cohen v. St. Louis, etc. R. Co., 34 Kan. 158, 8 Pac. Rep. 138, 55 Am. Rep. 242; St. Louis, etc. R. Co. v. Nyce, 61 Kan. 394, 59 Pac. Rep. 1040, 48 L. R. A. 241, overruling Briggs v. Chicago, etc. R. Co., 56 Kan. 526, 43 Pac. Rep. 1131; Omaha Bridge & T. R. Co. v. Whitney, 94 N. W. Rep. 513 (Neb.).

[2] Id.; Newgass v. Railway Co., 54 Ark. 140, 15 S. W. Rep. 188; Searl v. School District, 133 U. S. 553, 10 Sup. Ct. Rep. 374; Jacksonville, etc. R. Co. v. Adams, 28 Fla. 631, 10 So. Rep. 465, 14 L. R. A. 631; Greve v. First Division St. Paul & P. R. Co., 26 Minn. 66, 1 N. W. Rep. 816; Morgan's Appeal, 39 Mich. 675; Toledo, etc. R. Co. v. Dunlap, 47 id. 456, 11 N. W. Rep. 271; Lyon v. Green Bay R. Co., 42 Wis. 538; Justice v. Nesquehoning Valley R. Co., 87 Pa. 28; California & P. R. Co. v. Armstrong, 46 Cal. 85; Louisville, etc. R. Co. v. Dickson, 63 Miss. 380, 56 Am. Rep. 809; Jones v. New Orleans & S. R. Co., 70 Ala. 227; Oregon R. & N. Co. v. Mosier, 14 Ore. 519, 13 Pac. Rep. 300, 58 Am. Rep. 321; Daniels v. C. I. & N. R. Co., 41 Iowa, 52; Illinois Central R. Co. v. Le Blanc, 74 Miss. 650, 21 So. Rep. 760; International Bridge & T. Co. v. McLane. 8 Tex. Civ. App. 665, 28 S. W. Rep. 454; Bellingham Bay, etc. R. Co. v. Strand, 14 Wash. 144, 44 Pac. Rep. 140; Seattle & M. R. Co. v. Corbett, 22 Wash. 189, 60 Pac. Rep. 127; Cowan v. Southern R. Co., 118 Ala. 554, 23 So. Rep. 754; Calumet River R. Co. v. Brown, 136 Ill. 322, 26 N. E. Rep. 501. See United States v. Land in Monterey County, 47 Cal. 515.

[3] Cohen v. St. Louis, etc. R. Co., 34 Kan. 158, 8 Pac. Rep. 138, 55 Am. Rep. 242; Cochran v. Missouri, etc. R. Co., 94 Mo. App. 469.

[4] Price v. Weehawken Ferry Co., 31 N. J. Eq. 31.

[5] In re New York, etc. R. Co., 37 Hun, 317, and cases cited.

[6] Richmond & M. R. Co. v. Humphreys, 90 Va. 425, 18 S. E. Rep. 901.

rule applicable to railroad companies has been said to be equally applicable to all bodies vested with the right to condemn land.[1] There are cases which state the rule less broadly. In a case in which the trustees of a school district erected a school house upon land of which they did not know the owner, believing that he would consent to such use of it, and purposing, if he did not, to condemn the land, the owner was not entitled to recover the value of the building. The opinion lays stress on the fact that there was no element of wilfulness manifested.[2] In the Nebraska case cited the doctrine was applied without the limitations suggested in the Utah case. A case in the supreme court of the United States proceeds on the same view.[3] The right to obtain the land without paying for the improvements it has put upon it exists in the federal government.[4]

§ 1077. Compensation affected by title and nature of interest condemned; taking railroad property for street and telegraph uses. If land is held under restrictions in the deed as to the use which may be made of it or the character of the improvements which may be put upon it such restrictions affect the measure of recovery.[5] A railroad company is not obliged to take the entire width called for by its petition, and may ask for the adjustment of damages on a narrower strip than that therein described if the whole width is not needed for its purposes.[6] A condemning party may bind itself to take less than the whole interest in an estate,[7] and to lessen the damages which might result to the owner of land adjoining that taken.[8]

Property already taken for public use is subject to be again condemned for a different one if the right is conferred by ex-

[1] International Bridge & T. Co. v. McLane, 8 Tex. Civ. App. 665, 28 S. W. Rep. 454.

[2] Chase v. Jemmett, 8 Utah, 231, 30 Pac. Rep. 757, 16 L. R. A. 805; Burns v. School District, 61 Neb. 351, 85 N. W. Rep. 284.

[3] Searl v. School District, 133 U. S. 553, 10 Sup. Ct. Rep. 374.

[4] United States v. Smith, 110 Fed. Rep. 338.

[5] Allen v. Boston, 137 Mass. 319; Syracuse v. Stacey, 169 N. Y. 231, 62 N. E. Rep. 354 (rights in water); § 1074.

[6] Peoria, etc. R. Co. v. Bryant, 57 Ill. 473. See Schaible v. L. S. & M. S. R. Co., 10 Ohio Dec. 334.

[7] Tyler v. Hudson, 147 Mass. 609, 18 N. E. Rep. 582.

[8] St. Louis, etc. R. Co. v. Clark, 121 Mo. 169, 190, 25 S. W. Rep. 192. See § 1066.

press grant or necessary implication, but not otherwise.[1] A railroad may be crossed by a highway, and the easement for such crossing may be condemned by proceedings against the railway company, and the latter is entitled, in some states, to recover damages for such taking, subject, however, to its use for a railroad, for the expense of erecting and maintaining signs required by law at the crossing, for making and maintaining cattle-guards if necessary, and for flooring the crossing and keeping the planks in repair;[2] and if a street is opened under the tracks of a railroad the company must be compensated for the cost of a bridge or a viaduct to carry its trains over the street.[3] It is also to be compensated for any depreciation of the value of the land for the use to which it had been put.[4] In Minnesota, Ohio and Illinois the view taken is that there can be no recovery of compensation for providing and maintaining cattle-guards and sign-boards at a crossing made by laying out a new street. The duty of making and maintaining crossings is devolved upon railroad companies for the protection of the public in the exercise of the police power, and it is competent to extend it to crossings which may become necessary by events occurring after a railroad is built. It is otherwise in some states, but not in Illinois, as to the planking of the roadway between the tracks; that is an incident of the

[1] Western U. Tel. Co. v. Pennsylvania R. Co., 123 Fed. Rep. 33, — C. C. A. —.

[2] Old Colony, etc. R. Co. v. Plymouth, 14 Gray, 155; Commissioners v. Michigan Central R. Co., 90 Mich. 385, 51 N. W. Rep. 447; Commissioners v. Chicago, etc. R. Co., 91 Mich. 291, 51 N. W. Rep. 934; Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641, 26 N. W. Rep. 159; Chicago, etc. R. Co. v. Hough, 61 Mich. 507, 28 N. W. Rep. 532; Central R. Co. v. Bayonne, 51 N. J. L. 428, 17 Atl. Rep. 971; Kansas Central R. Co. v. Commissioners, 45 Kan. 716, 26 Pac. Rep. 394. See Kansas City v. Kansas City B. R. Co., 102 Mo. 633, 14 S. W. Rep. 808, 10 L. R. A. 851; Crossley v. O'Brien, 24 Ind. 325, 87 Am. Dec. 329.

Where it was sought to open several streets across the railroad's right of way and land owned and used by the company in operating its road, the damages were the value of the land taken for each street; the burden imposed upon the company by the opening of each street under the statutes of the state, and the actual damages resulting to the remainder of the railroad yard by reason of the interference with its use by the opening of each street, without reference to the opening of any other street. Toledo & O. Central R. Co. v. Fostoria, 7 Ohio Ct. Ct. 293.

[3] Cincinnati, etc. R. Co. v. Troy, 67 N. E. Rep. 1051 (Ohio).

[4] Commissioners v. Chicago, etc. R. Co., 91 Mich. 291, 51 N. W. Rep. 934.

new highway and, independently of statute, the municipality laying it would find it necessary to make that convenience for travelers.[1] The railroad company's right to this compensation is not affected by the fact that its business will be increased by the opening of the new highway.[2]

The supreme court of the United States, in a case taken to it from Illinois, has affirmed the view of the local court to the effect that the compensation due a railroad company because of the opening of a street across its tracks — the land not being taken, and the railroad not being prevented from using it for its ordinary purposes, and being interfered with only to the extent that its exclusive enjoyment for the purposes of railroad tracks was diminished to the extent of the use of the crossing as a street — is the amount of decrease in the value of its use for railroad purposes caused by its use for street purposes, the latter use being exercised jointly with the company for its purposes.[3] The right of the latter to sell the land was too remote a contingency to affect its recovery. The city was not bound to pay the expenses the company would necessarily incur in the construction of gates, keeping flagmen, planking the crossing, filling between the rails, etc.; nor was evidence that these would be necessary admissible to show the compensation due. These expenditures were made necessary under the police power of the state. Uncompensated obedience to a regulation enacted for the public safety under that power is not a taking or damaging of private property without just compensation,

[1] Lake Shore, etc. R. Co. v. Chicago, 148 Ill. 509, 37 N. E. Rep. 88; State v. District Court, 42 Minn. 247, 44 N. W. Rep. 7; State v. Shardlow, 43 Minn. 524, 46 N. W. Rep. 74; Railway Co. v. Sharpe, 38 Ohio St. 150; Chicago & N. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. Rep. 1109; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. Rep. 485. See Boston & A. R. Co. v. Greenbush, 5 Lans. 461; Portland & R. R. Co. v. Deering, 78 Me. 61, 2 Atl. Rep. 670, 57 Am. Rep. 784.

[2] State v. Shardlow, 43 Minn. 524, 46 N. W. Rep. 74.

[3] This is the rule of damages applied in several cases in Illinois, where no other elements of damage were present. Chicago & N. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. Rep. 1109; Chicago, etc. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. Rep. 78; Illinois Central R. Co. v. Commissioners of Highways, 161 Ill. 247, 43 N. E. Rep. 1100; Chicago, etc. R. Co. v. Naperville, 166 Ill. 87, 47 N. E. Rep. 734; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. Rep. 485; Illinois Central R. Co. v. Chicago, 169 Ill. 329, 48 N. E. Rep. 492; Same v. Normal, 175 Ill. 562, 51 N. E. Rep. 781; Same v. Lostant, 167 Ill. 85, 47 N. E. Rep. 62; Chicago & N. R. Co. v. Cicero, 157 Ill. 48, 41 N. E. Rep. 640.

or of property affected with a public interest.[1] Substantially the same doctrine has been announced by the New Jersey court of errors and appeals, which holds that nominal damages will satisfy the claim of a railroad for compensation for crossing its tracks at grade by a highway; that if structural changes are made necessary, such as the removal of buildings or changes in the tracks, compensation should be made therefor; that no allowance should be made for erecting or maintaining gates, etc., the employment of a flagman, or for planking between the rails.[2] In Wisconsin the rule is that the railroad company whose track is crossed by a highway may recover for the resulting diminished value of its easement in the land and the cost of making such structural changes in its road-bed and track as become necessary to preserve the track for the old use, except such changes as are required by law under the police power, or the reserved power to amend charters. Such structural changes include planking of the track and maintaining the same, but do not include the removal of the planking from time to time to enable the company to do the necessary tamping and to remove snow and ice from between the rails, the latter being operating expenses and too conjectural to form any basis for compensation. They do not include crossing gates; they are not structural changes in the track, and are not a necessary part of crossing construction. The cost of erecting and maintaining a crossing sign and of constructing and maintaining cattle-guards is not an element of damages because these requirements are imposed under the police power.[3] If the construction of a public ditch by tiling under the surface of a railroad track will make it necessary for the company to incur expense in supporting its track while the ditch is being made, such expense should be considered in awarding compensation.[4]

The fact that part of the right of way required for a street crossing is occupied by a building the location of which at the

[1] Chicago, etc. R. Co. v. Chicago, 166 U. S. 226, 247, 251, 17 Sup. Ct. Rep. 581, affirming 149 Ill. 457, 37 N. E. Rep. 78; Chicago, etc. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. Rep. 96.

[2] Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. Rep. 730, overruling Paterson & N. R. Co. v. Newark, 61 N. J. L. 80, 38 Atl. Rep. 689.

[3] Chicago, etc. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. Rep. 1118.

[4] Lake Erie & W. R. Co. v. Commissioners of Hancock County, 63 Ohio St. 23, 57 N. E. Rep. 1009.

place where it is is not necessary to its use by the company does not entitle it to compensation based on the market value of the land, in addition to the value of the building and its improvements. In such a case it is proper to consider the damages sustained by the separation of the building from a well, the former being taken and the latter not.[1] Substantial damages are not due a railroad company because the public use of a street crossing may result in the stoppage or slower movement of trains and increasing the danger of accidents.[2] Prospective loss of profits to a company as the result of destroying approaches to grain elevators built upon land leased from it, occasioned by the extension of a street across its right of way, cannot be recovered.[3] If the extension of a street across railroad tracks affects the operations of the company on land not taken so as to increase expenditures in handling and switching cars, making up trains, etc., or prevents the storing of cars on the track, proof of the fact is competent on the question of damages.[4] It is proper, if the opening of a street across the right of way and other premises will render them unavailable for a depot, to which they are peculiarly adapted, and there is no other property available for that purpose, to consider these facts in awarding compensation.[5] In such a case the value of land within the right of way, but not within the tracks, for the erection and use of such structures, other than tracks, as the railroad company might desire to erect and maintain for its business should be given it, though such land has no market value.[6] But in order that the value of the right of way may be recovered on the basis of its use for special purposes it must be shown that it has been put to such use or that there is an immediate intention to devote it thereto.[7]

In Maine where a highway is laid across a railroad the com-

[1] Illinois Central R. Co. v. Normal, 175 Ill. 562, 51 N. E. Rep. 781.

[2] Chicago & N. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. Rep. 1109; Chicago, etc. R. Co. v. West Chicago Street R. Co., 156 Ill. 255, 267, 40 N. E. Rep. 1008, 29 L. R. A. 485.

[3] Illinois Central R. Co. v. Lostant, 167 Ill. 85, 47 N. E. Rep. 62.

[4] Lake Shore, etc. R. Co. v. Chicago, 151 Ill. 359, 37 N. E. Rep. 880; Chicago, etc. R. Co. v. Naperville, 166 Ill. 87, 47 N. E. Rep. 734; Same v. Morrison, 195 Ill. 271, 63 N. E. Rep. 96.

[5] Chicago & N. R. Co. v. Cicero, 154 Ill. 656, 39 N. E. Rep. 574.

[6] Illinois Central R. Co. v. Chicago, 156 Ill. 98, 41 N. E. Rep. 45.

[7] Id.; Illinois Central R. Co. v. Chicago, 169 Ill. 329, 48 N. E. Rep. 492.

pensation for the land taken is to be awarded in view of the use which the company may be reasonably expected to make of it in the near future.[1] Where a common highway is laid over a turnpike road the owner of the latter will be entitled to recover damages. In apportioning them to the turnpike corporation against several towns the appraisers may take into consideration, along with the distance in each town, the value of the existing road with reference to the cost of construction and state of repair; but they cannot consider the greater ability of one town to pay, or the greater advantage which its inhabitants would receive from the free highway, and make these matters in part the basis of their apportionment.[2] In Michigan the rule is that a railroad company may recover for injury to its track, right of way and franchise occasioned by making a street crossing, in so far as such crossing is the natural, necessary and proximate cause of the injury.[3] Hence there may be a recovery for the injury sustained because the laying of a street across the railroad tracks renders an adjacent warehouse and the land on which it stands less available and valuable for warehouse purposes.[4] The expense of keeping a gateman or flagman at a crossing is also an element of damages there.[5] In Oklahoma a railroad company must be compensated for the expense of removing such of its structures as must be removed and adapting its side tracks to the changed conditions caused by opening a street.[6] After an extended examination of the authorities the Georgia court has declared that a railroad company which has laid its tracks across a highway or street must at its own expense make such alteration in its grade as will conform it to the newly-established grade of the highway or street, and that a statute requiring it so to do is valid.[7] The validity of statutes requiring substan-

[1] Portland & R. R. Co. v. Deering, 78 Me. 61, 2 Atl. Rep. 670, 57 Am. Rep. 784.

[2] Reed's Petition, 13 N. H. 381. See Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

[3] In re First Street, 66 Mich. 55, 33 N. W. Rep. 15.

[4] Commissioners of Parks v. Chicago, etc. R. Co., 91 Mich. 291, 51 N. W. Rep. 934.

[5] Detroit v. Detroit, etc. R. Co., 112 Mich. 304, 70 N. W. Rep. 573.

[6] Southern Kansas R. Co. v. Oklahoma, — Okl. —, 69 Pac. Rep. 1050.

[7] Cleveland v. City Council, 102 Ga. 233, 29 S. E. Rep. 584, 43 L. R. A. 638 (*sub nom.* Cleveland v. Augusta).

tially the same thing as to highways laid after the railroad was constructed has been declared.[1]

In a Kentucky case a railroad company cut through the base of a mountain, destroying a county road laid along the mountain side above the cut, with the result that a large section of the county was cut off from access to the county seat. The right of the county to maintain an action for the damages was sustained. In answering an objection to the damages awarded on the ground that they were excessive the court observed that they might have been prevented at inconsiderable cost on the part of the defendant, and that the cost of any remedy will be largely more than the amount of the verdict.[2] On a second appeal it was sought to show by newly-discovered evidence that the road might be restored at much less cost than the amount of the verdict, and a new trial was ordered on the theory that such cost would measure the damages.[3] This view was sustained on a third appeal.[4]

The condemnation will include everything on the land adapted to the proposed public use; thus, if land is taken for a way and has already been used as such the condemnation includes all things placed, fixed or existing upon it, adapted [447] to its use as a public way, such as gravel, stone or wood paving, plank, flag stones, bridges, culverts or lamp posts and all works erected on or connected with it for use, or rendering its use more safe and beneficial as a way.[5] Even in the ordinary cases of taking land for the first time for a public way, the proprietors have only the right to remove buildings, trees and fences, and generally things not adapted to its use as a way, or not required for the supply of materials necessary or useful in making or repairing the way.[6] If erections upon the land taken are of such a character as to become so incorporated therewith as to be regarded as part of it they should be in-

[1] Chicago & N. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. Rep. 1109. See Chicago, etc. R. Co. v. Chappell, 124 Mich. 72, 82 N. W. Rep. 800, holding otherwise where a private drain is made, the statute requiring the railroad company to put in a culvert without compensation.

[2] Louisville & N. R. Co. v. Whitley County Court, 95 Ky. 215, 24 S. W. Rep. 604, 44 Am. St. 220.

[3] S. C., 100 Ky. 413, 38 S. W. Rep. 678.

[4] S. C., 20 Ky. L. Rep. 1367, 49 S. W. Rep. 332.

[5] Central Bridge Co. v. Lowell, 15 Gray, 111.

[6] Id.; Brown v. Worcester, 13 Gray, 31.

cluded in the appraisal.[1] Steps projecting from the door of a house over land taken for a highway are obstructions thereto, and must be removed by the owner of the land, and the expenses are to be included in the assessment of damages occasioned by such taking; so with the eave-spouts and bay-windows if they interfere with the public use of the entire limits of the highway.[2] Where the abutting owner takes title in fee to the center of a street and acquired it without reference to any original dedication which contemplated the future adoption of the street and the vesting of the fee thereof in the public, or in the absence of legislation in force when conveyances were made by former proprietors affecting their rights therein, he has property of value in the street in the degree of control resting in him as to the uses to which the street shall be put, and is entitled to substantial damages for the loss of the fee thereof, which are to be measured by its effect upon the value of his remaining property.[3]

The compensation due a railroad company for the construction of a telegraph line along its right of way is measurable by the decrease in the value of the use of the right of way for railroad purposes. If the part sought to be taken is not in actual use, and it is shown that the construction of the telegraph line will not materially interfere with the exercise of the railroad company's franchise, the recovery cannot exceed a nominal sum.[4] In an Illinois case, which is a leading one on the question, it is held that the damages are not to be measured by the value of the land between the poles and under the wires, but by the extent to which the value of its use of the land between the poles and under the wires is diminished for railroad purposes. The contingency that the railroad company might at some future time lay another track which the telegraph poles will obstruct is too remote for consideration, it not appearing that there is any immediate demand for or intention to lay such track; this rule is particularly applicable where the petition of the telegraph company binds it to remove the poles or so place its wires that they will not interfere with the

[1] Id.

[2] Id.

[3] Buffalo v. Pratt, 131 N. Y. 293, 30 N. E. Rep. 233, 27 Am. St. 592, 15 L. R. A. 413.

[4] Mobile & O. R. Co. v. Postal Tel. Cable Co., 120 Ala. 21, 24 So. Rep. 408.

improvements the railroad company may make. If such petition avers that if any change in the earth's surface along the right of way has been made the telegraph poles will not be set in such places, the railroad company has no claim for compensation proportionate to its expense in preparing its road-bed. If a lease of the right to maintain a telegraph line along the right of way is void as against public policy because it attempts to grant an exclusive right, such lease is not admissible to show that the rent stipulated to be paid should be considered in estimating the damages.[1] The railroad company cannot recover because of added expense in burning grass on its right of way by reason of the telegraph poles being thereon; such expense is too remote to be a basis for compensation.[2]

Under a statute providing for the purchase of a system of waterworks on payment of their fair and equitable value, it was contended that the test of value was the income or earnings capitalized. This view was met by the argument that the franchise had ceased, and that basing the value upon earnings would be to require the city to pay for a franchise it did not need; that the true way of ascertaining the fair and equitable value was to take the property, as a system, regardless of the franchise or the past or possible earnings of the plant. Neither of these contentions met the approval of the court. The value was fixed without regard to the franchise, which ceased to exist by reason of the purchase; it was not limited to the cost of reproducing the plant, nor was the original cost accepted as the value because that cost and "present value" are not synonymous. Allowance was made for the additional value of the plant by reason of its connections with buildings and the facilities afforded for supplying them with water, notwithstanding the company did not own such connections. The court said, by Brewer, J.: Such connections are not compulsory, but depend upon the will of the property

[1] St. Louis C. R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. Rep. 382. Two judges dissented. This case is followed in Mobile & O. R. Co. v. Postal Tel. Cable, 76 Miss. 731, 26 So. Rep. 370, 45 L. R. A. 223, overruling Postal Tel. Cable Co. v. Alabama & V. R. Co., 68 Miss. 314, 8 So. Rep. 375; Railroad v. Telegraph Co., 101 Tenn. 62, 46 S. W. Rep. 571; Postal Tel. Cable Co. v. Oregon Short Line R. Co., 104 Fed. Rep. 623, 23 Utah, 474, 65 Pac. Rep. 735, 114 Fed. Rep. 787.

[2] Postal Tel. Cable Co. v. Oregon R. Co., 23 Utah, 474, 65 Pac. Rep. 735.

owners and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant — not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private dwellings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn.[1] In a case where the entire plant of a water company and other property owned by it, but not used in operating the plant, was taken, the damages, aside from the loss of the franchise, were ascertainable by the cost of construction, allowance being made for depreciation (this not being conclusive or controlling); the fact that the plant was a going concern; its actual earnings, regard being had to the reasonableness of the rates it charged and the existence of the power to limit them, the quality of the water it furnished, the fitness of the plant, and the source of its supply to meet all reasonable requirements; the net income; the cost of reproducing the system by one substantially like it; the time and cost required to develop a similar system with the added net income and profits which might accrue to a purchaser during the time required for the construction and development of the business; the capitalization of income at reasonable rates, while not a sufficient test of value, may be considered. So far as the water system was practically exclusive, the good-will of the company was not to be considered. As to property not connected with such system except by reason of common ownership, its value was to be fixed by what it was fairly worth to the owner under conditions permitting a prudent and beneficial sale of it.[2] The actual value of a turnpike road was arrived at, in connection with other evi-

[1] National Waterworks Co. v. Kansas City, 62 Fed. Rep. 853, 10 C. C. A. 653, 27 L. R. A. 827. See Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. Rep. 533.

[2] Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. Rep. 6.

dence, by the amount of its stock which was at par.[1] In ascertaining the value of a turnpike "the fair value of a roadbed and the fair value of the franchises at the time of the condemnation are to be determined from the physical condition of the property, its substructure, superstructure, and approaches to bridges, together with the right or privilege of the company to collect tolls from travelers. The entire company rights of the turnpike company are taken and it is the value of the property to the owner, and not to the county taking it, that is to be determined."[2] If but part of a turnpike is taken the damage must be arrived at by considering the effect of so doing upon the whole road. If property used by the company, though located without the limits of the right of way, is lessened in value that is an element of damage.[3]

§ 1078. Same subject; condemnation of railroad property for railroad uses. Having considered the question of damages recoverable by a railroad company whose right of way is crossed by a subsequently laid-out street, and along whose right of way a telegraph line is established, it is now proposed to group the authorities on the question of damages where the road of one such company is crossed at grade by the road of another. The rule in Massachusetts is thus stated by Gray, C. J.: "A railroad corporation, across whose road another railroad or a highway is laid out, has the like right as individuals or bodies politic and corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface absolutely required by law, or in fact necessary to be made by the corporation injured in order to accommodate its own land to the new condition.[4] But it is not entitled

[1] Richmond & L. Turnpike Road Co. v. Madison County Fiscal Court, — Ky. —, 70 S. W. Rep. 1044.

[2] Chambersburg & B. Turnpike Road, 20 Pa. Super. Ct. 173, 180, citing Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54, 20 Atl. Rep. 407; Clarion Turnpike & B. Co. v. Clarion County, 172 Pa. 243, 33 Atl. Rep. 580; West Chester & W. Plank Road Co. v. Chester County, 182 Pa. 40, 37 Atl. Rep. 905.

[3] Chambersburg & B. Turnpike Road, *supra*.

[4] Commonwealth v. Boston & M. R., 3 Cush. 25, 53; Old Colony R. v. Plymouth, 14 Gray, 155; Grand Junction R. & D. Co. v. County Com'rs, id. 553.

to damages for the interruption and inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense for ringing the bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad."[1]

In Illinois compensation is due for property "injured" as well as that which is "taken." Hence, if land used for a right of way for a railroad is taken, and it has no market value, compensation for it is to be made with reference to the use to which it is put.[2] In such a case the damages may extend beyond the area of the land taken; the obstructions which would thereby be placed in the way of prosecuting the business of the company whose road is crossed in reaching the different parts of its line and its capacity for doing business are elements of damage.[3] In a subsequent case the doctrine that direct and immediate damages only are recoverable was applied. "It is," said the court, "that injury which depreciates the value of the property, whether by taking a portion of it or rendering the portion left less useful or, in case of a railroad company or other corporate body, less capable of transacting its business — such a hindrance and inconvenience as to occasion loss, or diminish and limit its capacity to transact its business by decreasing the power to transact as much or necessarily increasing the expense of what may be done, although not diminished. And this hindrance or obstruction must produce immediate or future loss. But when the new structure is made, if it does not necessarily abridge the owner's capacity without increased expense to transact an equal volume of business, then, although there may be inconvenience and annoyance, unless the property is depreciated in value, these are

[1] Massachusetts, etc. R. Co. v. Boston, etc. R. Co., 121 Mass. 124, citing Proprietors of Locks & Canals v. Nashua & L. R., 10 Cush. 385, 392; Boston & W. R. v. Old Colony R., 12 id. 605, 611, 2 Allen, 142; Old Colony R. v. Plymouth, 14 Gray, 155. The view stated seems to be approved in Kansas City Suburban Belt R. Co. v. Kansas City, etc. R. Co., 118 Mo. 599, 621, 24 S. W. Rep. 478.

[2] Lake Shore, etc. R. Co. v. Chicago & Western Indiana R. Co., 100 Ill. 21.

[3] Id.; Chicago, etc. R. Co. v. Englewood C. R. Co., 115 Ill. 375, 4 N. E. Rep. 246, 56 Am. Rep. 173.

not elements of damage."[1] In Michigan "any additional expense created in the ordinary use" of the pre-existing road,[2] "or any other injury or damage to its track, right of way or franchise, occasioned by the crossing, and which may properly be considered as the natural, necessary and approximate cause thereof," is recoverable.[3] In New Jersey the condemning company may specify in its petition the mode in which it proposes to cross the track of the other, and compensation will be awarded for damage which results from that mode. If a material change is thereafter made from the method indicated and additional damage results, compensation therefor must be made. If, however, the petition does not define how the crossing will be made the assessment of damages will be upon the same basis as where the land of individuals is condemned for railroad purposes — any manner of crossing at present lawful and necessary will be considered, and also all lawful changes which may be made in the future.[4]

In several states the right of way at grade of a railroad company across a highway does not stand on any different footing than that of any other corporation authorized by the state to use the highway for purposes of travel. Hence, such impairment of its property as results from the crossing at grade of the tracks of a railroad company laid across a highway by the track of an electric tramway company for the lawful location of its road is *damnum absque injuria*.[5] The probability

[1] Peoria, etc. R. Co. v. Peoria & F. R. Co., 105 Ill. 110, 118. Hence it was ruled that damages cannot be recovered because of the delay, inconvenience or expense which may result in the operation of a railroad because of its compliance with a statutory police regulation requiring trains to stop at all points where the road is crossed by other tracks. Id.; Flint, etc. R. Co. v. Detroit, etc. R. Co., 64 Mich. 350, 31 N. W. Rep. 281. Nor for the increased danger of crossing the projected road at grade. Peoria, etc. R. Co. v. Peoria & F. R. Co., *supra*.

[2] Flint, etc. R. Co. v. Detroit, etc. R. Co., *supra;* Commissioners of Parks, etc. v. Michigan Central R. Co., 90 Mich. 385, 51 N. W. Rep. 447; Same v. Chicago, etc. R. Co., 91 Mich. 291, 51 N. W. Rep. 934; Grand Rapids v. Bennett, 106 Mich. 528, 64 N. W. Rep. 585.

[3] Toledo, etc. R. Co. v. Detroit, etc. R. Co., 62 Mich. 564, 29 N. W. Rep. 500, 4 Am. St. 875; Chicago, etc. R. Co. v. Springfield, etc. R. Co., 67 Ill. 142, 96 id. 274.

[4] National Docks, etc. Co. v. United Cos., 53 N. J. L. 217, 21 Atl. Rep. 570, 26 Am. St. 421.

[5] New York, etc. R. Co. v. Bridgport Traction Co., 65 Conn. 410, 32 Atl. Rep. 953, 29 L. R. A. 367; Chicago, etc. R. Co. v. West Chicago

that accidents may occur because of the crossing of one railroad by another cannot be considered as an element of damages, nor can any allowance be made in such case for delay, inconvenience or damages arising from the part of the crossing which is in the street.[1] In Minnesota the accustomed rental charged by railroad companies for the use of land on which to erect and maintain grain elevators is the basis upon which compensation is awarded when land is condemned for such use.[2]

In a case in Iowa the defendant company built its line of road in close proximity to a right of way previously acquired by the plaintiff, at some places running parallel to the latter, and for three miles upon the plaintiff's right of way, which it crossed five times; two of which crossings were at such an acute angle as to be impracticable as railway crossings. It did not appear that the defendant's acts prevented the building of the plaintiff's road; but it did not appear that the plaintiff had bought the right of way. The conclusion reached was that the appropriation made was not of the entire right of way, and that the compensation could not be estimated on that basis, but on the basis of the value of the advantage gained by the defendant.[3] In a Missouri case which upheld the right of one street railway company to use the track of another such company, it was ruled that the loss of business because of the division of the patronage of the latter was not an element of damages; neither were the delays, inconveniences or jolts arising from making the connections from one track to another, that it was not proper to charge the former company with a portion of the special franchise tax paid by the latter for the privilege of constructing and operating its road. The grounds upon which and the basis for allowing compensation included the payment by the company using the tracks of interest on one-half the value of the road whose tracks it used, such value

Street R. Co., 156 Ill. 255, 40 N. E. Rep. 1008, 29 L. R. A. 485; Chicago, etc. R. Co. v. Steel, 47 Neb. 741, 66 N. W. Rep. 830; Same v. Whiting, etc. R. Co., 139 Ind. 297, 38 N. E. Rep. 604, 47 Am. St. 264; Du Bois Traction Passenger R. Co. v. Buffalo, etc. R. Co., 149 Pa. 1, 24 Atl. Rep. 179.

[1] Kansas City Suburban Belt R. Co. v. Kansas City, etc. R. Co., 118 Mo. 599, 24 S. W. Rep. 478.

[2] Stewart v. Great Northern R. Co., 65 Minn. 515, 523, 68 N. W. Rep. 208, 33 L. R. A. 427 (*sub nom.* Stewart's Application).

[3] Chicago, etc. R. Co. v. Cedar Rapids, etc. R. Co., 86 Iowa, 500, 53 N. W. Rep. 305.

to be computed as of the time the proceeding was begun, and not its cost at the time when it was a cable road; the payment of one-half the annual property taxes, one-half of the annual cost of repairs and maintenance of the tracks and paving; of one-half the cost of sanding, watering, cleaning and salting the tracks; one-half the cost of renewing them and of granite and wood paving, whenever these were required, and by requiring it to construct switches and connections with the tracks where the roads intersected, and maintain them, and keep and pay switchmen.[1]

§ 1079. Same subject; injury to franchise. So long as the exercise of rights under a franchise are not interfered with there is no liability for damages because competition which results from a public improvement makes the right valueless, although some of the land owned by the holder of the franchise may be taken.[2] But if property, as a bridge and the corporate right to maintain it and collect tolls, is taken, the general rule that the market value governs the compensation does not apply, for the reason that such property cannot be said to have such value. Its cost is not the standard, because the value of it depends upon its earnings. The damages must be measured by the value of the use, if the market value of the stock is not proven. The value of the use depends upon facts existing and shown at and about the time of the taking unless they are proven to be exceptional.[3] Where the owner of a ferry franchise held a lease of the land used for a landing, which land was taken by a railroad company with the result of a material interference with the landing of boats, the damages were measured by the difference between the value of the leasehold for the purpose to which it was put until the end of the lease and its value for that period as so affected. The damages for the depreciation in the value of

[1] Grand Avenue R. Co. v. Citizens' R. Co., 148 Mo. 665, 50 S. W. Rep. 305.

[2] Moses v. Sanford, 11 Lea, 731; Riverton Ferry Co. v. McKeesport & D. Bridge Co., 179 Pa. 466, 36 Atl. Rep. 186.

[3] Mason v. Harper's Ferry Bridge Co., 20 W. Va. 223; Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54, 20 Atl. Rep. 407.

The cost of the bridge, the income derived from it, and all other facts and circumstances showing its value, are proper. Dougherty Co. v. Tift, 75 Ga. 815; West Chester & W. Plank Road Co. v. Chester County, 182 Pa. 40, 37 Atl. Rep. 905.

the franchise were only ascertainable in connection with the compensation for injury to the right in the land.[1] Where the land condemned was owned by a corporation operating a union depot and adjoined the same, the injury to the defendant's franchise was compensated for by an allowance for injury to the real estate and plant directly caused by the presence of the plaintiff's railway on the land taken and the operation of its railroad in transportation thereon.[2]

A turnpike company whose road has been occupied by the tracks of a street railway may recover for injury immediately and directly resulting. The damage is not measured by the additional cost of maintaining the turnpike only, but by the depreciation in the value of the property as a whole. If the occupation and use and the presence of the tracks and cars are such a menace to travel as to cause those who would otherwise use the road to cease doing so, in whole or in part, its earning capacity is thereby affected, and proof may be made of the decrease in revenues and depreciation in the market value of the capital stock. Loss of revenue from competition should not be regarded; neither should such loss caused by the diversion of travel from the turnpike by any cause for which the railway company is not responsible.[3]

Damages for the loss of a privilege granted by law include the enhancement of its value resulting from legislation subsequent to the grant, but not increased value following acts done under color of license or under a revocable license.[4] It has been held that in awarding damages for injury to a franchise the possibility of the repeal of the statute which gave it is not to be considered;[5] but the better rule is that the probable life of the franchise may be inquired into.[6] Where the corporation whose property was taken had the privilege of supplying a village and its inhabitants with water, such priv-

[1] Pittsburgh, etc. R. Co. v. Jones, 111 Pa. 204, 2 Atl. Rep. 410, 56 Am. Rep. 260.

[2] St. Louis, etc. R. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. Rep. 483.

[3] Allentown & Co. Turnpike Co. v. Lehigh Valley Traction Co., 174 Pa. 273, 34 Atl. Rep. 565.

[4] Kingsland v. Mayor, etc., 110 N. Y. 569, 18 N. E. Rep. 435, 45 Hun, 198. See In re Commissioners of State Reservation at Niagara, 37 Hun, 537.

[5] Mason v. Harper's Ferry Bridge Co., 20 W. Va. 223.

[6] West Chester & W. Plank Road Co. v. Chester County, *supra*.

ilege not being exclusive, and its contract with the village being soon to expire, though there was a possibility of an extension of such contract, in the absence of evidence showing a legal obligation upon the village or the inhabitants thereof to take water in excess of the contracts in effect, there was no *data* to support an award of anything in excess of nominal damages.[1] Under a statute providing for the condemnation of the property of a water-works company by a city and a direction that the fair value of such property for the purposes of its use by the city shall be paid, the company's right to lay pipes in the streets was not to be regarded because the city had authority to furnish water, and the laying of pipes would not be an additional burden to the highway.[2] In a recent case in Maine this question received full consideration, and many points were passed upon. The statute under which the proceedings were had authorized the condemnation by a corporation of all the property of a water company upon making just compensation therefor. This was construed to include the franchise of said company within the territory described, regardless of whether it had exercised all its rights and privileges thereunder. The value of the local franchise was to be determined in part by the net income of the business; but being a *quasi* public, or public service, corporation, and therefore subject to restriction as to its charges, the reasonableness of these was to be regarded. In solving the question as to what constitutes reasonable rates, the main factors are the right of the company to a fair income upon the fair value of its property, regard being had to its cost, depreciation, and operating expenses, the right of the public to be served at such rates, the ordinary hazard of the enterprise and the fact that the franchise was not perpetual. The value of the franchise was not affected by the previous conduct of the company, nor by the rates it had charged its patrons, but was dependent upon the net earning power of the company, present and prospective, the rates being assumed to be reasonable, and the value being estimated with reference to the owner and not to

[1] In re Board of Water Commissioners, 71 App. Div. 544, 76 N. Y. Supp. 11. See Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. Rep. 718.

[2] Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. Rep. 533.

the party condemning. In considering the prospective development of the franchise regard must be had to the probability that further investment may be required to develop the use, and to the fact that the owner will be entitled to any appreciation based on natural causes.[1]

§ 1080. Same subject; elevated railroad cases. Under the constitution of New York the liability of corporations exercising the power of eminent domain does not extend beyond making compensation for property taken. The cases which impose a larger responsibility are based upon statutes. This taking need not be of real property. Owners of land which abuts upon public streets in New York city have easements therein for ingress and egress, and for the free circulation of light and air, which easements are interests in real estate and constitute property. In estimating their value they are not considered as property, separate and distinct from the land to which they are appurtenant.[2] Hence the property owner's right to compensation is measured, not by the value of the easements in the street separate from his abutting property, but by the damages which such property sustains as a result or consequence of the loss of the easements.[3] This involves an inquiry into the effect of the improvement upon the whole property and a consideration of all its advantages and disadvantages. If the rental or market value of an entire building affected is diminished there may be a recovery; but in the case of an elevated railroad which causes a diminution in the rental value of the upper floors, if there is an increase in the rental value of it as

[1] Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. Rep. 6.

[2] Such easements are incapable of being separated from the property, and pass, upon a sale thereof, to the purchaser with the right to any remedy for their invasion. Shepard v. Manhattan R. Co., 169 N. Y. 160, 62 N. E. Rep. 151, and cases cited.

[3] "While damages have been allowed where premises are so situated that they are to be considered as a single parcel, although the total frontage might not be upon the street occupied by the elevated railway, yet where such premises are improved by buildings distinct within themselves, some of them having no frontage upon the avenue occupied by the railroad, it is difficult to see upon what theory an award for the destruction of easements upon the avenue upon which such buildings have no frontage can be predicated." Keene v. Metropolitan E. R. Co., 79 Hun, 451, 29 N. Y. Supp. 971. See Cooper v. Manhattan R. Co., 85 Hun, 217, 32 N. Y. Supp. 1054; Reilly v. Manhattan R. Co., 43 App. Div. 80, 59 N. Y. Supp. 335.

a whole, to the same or a greater extent, there is no injury.[1] The effect of the road upon business in the particular street generally may be considered in assessing damages.[2] The consideration of benefits must include such as are general, as well as those which are special.[3] Evidence of the effect of the railroad upon business in the particular street is not improper because it appears that the diminution in business is in part attributable to other causes.[4] The fact that the presence of the road has changed the character of the street on which the plaintiff's property is situated is not ground for recovery.[5] In estimating the damages the structure is not alone to be considered; account must be taken of the incidental injuries caused by the running of trains upon it.[6] The owner's right to recover is not affected by the value of the improvements he has put upon the land; if they do not bring the return they would have done but for the wrongful occupation of the street the wrongdoer must answer for the loss.[7] A religious corporation may, in an equitable action to recover past and fee damages resulting to it from the operation of a road in a street on which its house of worship is situated, recover as past or rental damages for the serious interruption and interference by noise with its religious exercises.[8]

[1] Newman v. Metropolitan E. R. Co., 118 N. Y. 618, 23 N. E. Rep. 901, 7 L. R. A. 289, summarizing the result of Story v. New York E. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Metropolitan E. R. Co., 104 N. Y. 268, 10 N. E. Rep. 528. Sutro v. Manhattan R. Co., 137 N. Y. 592, 33 N. E. Rep. 334; Sperb v. Metropolitan E. R. Co., 137 N. Y. 596, 33 N. E. Rep. 319; Wright v. New York E. R. Co., 78 Hun, 450, 29 N. Y. Supp. 223; Markert v. Manhattan R. Co., 87 Hun, 213, 33 N. Y. Supp. 842, are to the same effect. The general subject is discussed in Bohm v. Metropolitan E. R. Co., 129 N. Y. 576, 29 N. E. Rep. 802, 14 L. R. A. 344.

[2] Newman v. Metropolitan E. R. Co., 118 N. Y. 618, 23 N. E. Rep. 901, 7 L. R. A. 289; Drucker v. Manhattan R. Co., 106 N. Y. 157, 12 N. E. Rep. 568, 60 Am. Rep. 437; Carroll v. New York E. R. Co., 14 App. Div. 278, 43 N. Y. Supp. 524, affirmed without opinion, 162 N. Y. 603.

[3] Saxton v. New York E. R. Co., 139 N. Y. 320, 34 N. E. Rep. 728.

[4] Drucker v. Manhattan R. Co., *supra;* Shepard v. Same, 169 N. Y. 160, 62 N. E. Rep. 151.

[5] Stacey v. Metropolitan E. R. Co., 15 App. Div. 534, 44 N. Y. Supp. 534.

[6] Sperb v. Metropolitan E. R. Co., 137 N. Y. 155, 33 N. E. Rep. 319; Lazarus v. Metropolitan R. Co., 14 App. Div. 438, 43 N. Y. Supp. 873.

[7] Storm v. New York E. R. Co., 82 Hun, 11, 31 N. Y. Supp, 13; Shepard v. Metropolitan E. R. Co., 48 App. Div. 452, 62 N. Y. Supp. 977.

[8] Rector, etc. v. New York E. R. Co., 21 App. Div. 47, 47 N. Y. Supp. 418.

If the occupation of the property has preceded the institution of condemnation proceedings the value of the easements affected is to be measured as of the time of the trial,[1] and by the difference between the value of the property to which they are appurtenant with the easements unimpaired and its value with them in the condition they are left by the road.[2] As we have seen, the damages are measured by the decreased value of the whole property; this rule applies as well where the action is brought by lessees and occupants as where the owner is the complainant.[3] The latter may recover to the extent of the diminished rental value, though he occupied the premises, or, at his option, on the basis of the lessened usable value.[4] There cannot be a recovery of rental value for any period during which the premises were not in condition to rent.[5] Such value is not, necessarily, to be based upon the purpose for which the property was in fact occupied; the owner is entitled to recover to the extent of the lessened rental value for any purpose for which it might have been rented but for the defendant's wrong.[6] If the rent to be paid after a certain period, before the expiration of which an elevated road is erected in front of the premises, is to be fixed by appraisers, the lessor may recover for the lessened amount at which, but for such erection, they would have fixed the rent.[7]

Damages for loss of business are too remote.[8] If the recovery of permanent damages is sought and a tender made of a deed of the premises, the railroad company is not subjected to increased liability because it appropriated the premises without right,[9] nor for specific items of damage during particular

[1] Otten v. Manhattan R. Co., 2 App. Div. 396, 37 N Y. Supp. 982; Hynes v. Same, 54 App. Div. 256, 66 N. Y. Supp. 510.

[2] Kenkele v. Manhattan R. Co., 55 Hun, 398, 8 N. Y. Supp. 707; In re Brooklyn E. R. Co., 55 Hun, 165, 8 N. Y. Supp. 78; Odell v. New York E. R. Co., 130 N. Y. 690, 29 N. E. Rep. 998.

[3] Taylor v. Metropolitan E. R. Co., 50 N. Y. Super. Ct. 311; Kearney v. Same, 129 N. Y. 76, 29 N. E. Rep. 70.

[4] Woolsey v. New York E. R. Co., 134 N. Y. 323, 30 N. E. Rep. 387.

[5] Martin v. Manhattan R. Co., 63 Hun, 350, 18 N. Y. Supp. 238.

[6] Scott v. Manhattan R. Co., 60 N. Y. Super. Ct. 233, 17 N. Y. Supp. 364.

[7] Winthrop v. Manhattan R. Co., 17 App. Div. 509, 45 N. Y. Supp. 515, affirmed without opinion, 161 N. Y. 638; Kernochan v. Same, 161 N. Y. 339, 55 N. E. Rep. 906.

[8] Taylor Metropolitan E. R. Co., 50 N. Y. Super. Ct. 311; Kearney v. Same, 129 N. Y. 76, 29 N. E. Rep. 70.

[9] Ireland v. Metropolitan E. R. Co.,

periods of time, nor for loss of rents in addition to compensation for the property or the diminution in its value.[1] The adaptability of the premises to a particular business and the effect of the impairment of the easement upon that business are to be considered.[2] If the easement lost was used for business purposes and its loss prevents access to a river the compensation is measurable by the cost of restoring the lost communication, if that is practicable, with an additional allowance for the increased expense attendant upon the use of the new means of communication.[3] Where the recovery of fee damage is sought, that is most satisfactorily established by showing how the rental values have been affected by the defendant's interference with the property. The inquiry may extend beyond this, as though the proceeding sought the condemnation of the property. But only such damages can be recovered as might be awarded in such a proceeding.[4]

In considering the damages sustained by the operation of an elevated railroad the noise, smoke, cinders, invasion of privacy, etc., attendant upon it are to be regarded[5] (except where damages are sought to be recovered for injury to the fee),[6] and in an action to recover for the unlawful use and operation of a road it is not a partial justification that some of the consequences endured would have followed a lawful exercise of authority and that no action therefor could have been maintained.[7] There cannot be an apportionment of the damages where the railroad company uses more of the street than it is entitled to do on the basis of the extent to which its use is unauthorized.[8] The hazard from fire growing out of the

52 N. Y. Super. Ct. 448; Taylor v. Same, Kearney v. Same, *supra*.

[1] Ireland v. Metropolitan E. R. Co., *supra*.

[2] In re Union E. R. Co., 55 Hun, 163, 7 N. Y. Supp. 853.

[3] In re New York, etc. R. Co., 29 Hun, 646.

[4] Crampton v. Brooklyn E. R. Co., 3 App. Div. 263, 38 N. Y. Supp. 384.

[5] Lahr v. Metropolitan E. R. Co., 104 N. Y. 268, 10 N. E. Rep. 528; Ireland v. Metropolitan E. R. Co., 52 N. Y. Super. Ct. 450; Ode v. Manhattan R. Co., 56 Hun, 199, 9 N. Y. Supp. 338; Kane v. New York E. R. Co., 125 N. Y. 164, 26 N. E. Rep. 278, 11 L. R. A. 640; Messenger v. Manhattan R. Co., 129 N. Y. 502, 29 N. E. Rep. 955; Moore v. New York E. R. Co., 130 N. Y. 523, 29 N. E. Rep. 997.

[6] American Bank Note Co. v. New York E. R. Co., 129 N. Y. 252, 29 N. E. Rep. 1029.

[7] Lahr v. Metropolitan E. R. Co., *supra*.

[8] Matter of Brooklyn E. R. Co., 6 App. Div. 53, 39 N. Y. Supp. 474.

maintenance and operation of an elevated road is not an element of damage to the abutting owner.[1]

Exemplary damages have been denied where there was a failure to institute condemnation proceedings before operating the road on the ground that liability for compensatory damages had not then been established.[2] As appears elsewhere,[3] the rule in New York is that permanent damages cannot be recovered in an action of trespass upon the assumption that the wrong done is permanent and irremediable. This rule applies to common-law actions against elevated railroad companies.[4] It has been departed from in one case where the parties agreed upon the rule of damages.[5]

§ 1081. Same subject; injuries to various interests. Just compensation is not limited to and assessable only in favor of the owner in fee. A life interest or a term of years may be carved out of the fee. In such case the tenant for life or lessee, as well as the remainder-man or lessor, is equally entitled to compensation for injury to his interest.[6] Every person having any interest, partial or temporary, or permanent and absolute, is entitled to damages proportioned to the injury to that interest.[7] If the reversionary interest in the land sought to be condemned is so remote that its value is merely nominal or speculative, it is not required that even nominal damages be awarded, at least where the proceeding was instituted by the party who sought to obtain it and that party is charged

[1] Siegel v. New York & H. R. Co., 62 App. Div. 290, 70 N. Y. Supp. 1088.

[2] Powers v. Manhattan R. Co., 120 N. Y. 178, 24 N. E. Rep. 295.

[3] § 1016.

[4] Pond v. Metropolitan E. R. Co., 112 N. Y. 186 19 N. E. Rep. 487, 8 Am. St. 734.

[5] Lahr v. Metropolitan E. R. Co., 104 N. Y. 268, 10 N. E. Rep. 528.

[6] Colcough v. Nashville, etc. R. Co., 2 Head, 171; Getz v. Philadelphia & R. R. Co., 105 Pa. 547; Philadelphia, etc. R. Co. v. Getz, 113 id. 214, 6 Atl. Rep. 356; Pause v. Atlanta, 98 Ga. 92, 26 S. E. Rep. 489, 58 Am. St. 290; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. Rep. 746, 21 L. R. A. 212; Matter of Daly, 29 App. Div. 286, 51 N. Y. Supp. 576 (ruled under sec. 982 of the New York consolidation act, ch. 410, laws of 1882); Gluck v. Mayor, etc., 86 Md. 315, 32 Atl. Rep. 515.

[7] Parks v. Boston, 15 Pick. 198; Lawrence v. Boston, 119 Mass. 126; Biddle v. Hussman, 23 Mo. 597; Breed v. Eastern R. Co., 5 Gray, 470; Platt v. Bright, 29 N. J. Eq. 128; State v. Hulick, 33 N. J. L. 307; First Parish v. Middlesex, 6 Gray, 106; Miller v. Newark, 35 N. J. L. 460; Chicago v. Garrity, 7 Ill. App. 474; Morin v. St. Paul, etc. R. Co., 30 Minn. 100, 14 N. W. Rep. 460; Fulton County v. Amorous, 89 Ga. 614, 16 S. E. Rep. 201.

with the costs in any event.[1] In fixing the damages due a tenant the injury done the easement is only to be regarded.[2] A lessee who has the right to remove improvements made upon the leased premises during his term only in case they are sold cannot recover the value of the improvements.[3] The owner of timber standing on the land of another may recover for the taking of it its value upon the stump, with interest thereon from the time of the appropriation; if the timber had no market value where it stood such value may be fixed by proof thereof at the nearest market, less the expense of getting it there.[4] It is strongly intimated in Minnesota that a homesteader on government land, whose patent thereto is not earned, is entitled to practically the same damages as if he owned the fee;[5] but the better rule is that he is entitled to recover for the same causes that the absolute owner may recover for, the extent of his recovery depending upon the improvements, the length of time he has been in possession and other facts which may affect his right to obtain a patent.[6] One who erects a building on land to which he has no title and who is a trespasser cannot recover for the taking of the building.[7]

If actual entry upon land cannot be made until compensation is paid or secured the owner may remain in possession after a railroad has been located and until entry, and recover for the loss of crops planted before security or notice of intent to enter for the purpose of construction was given. A tenant of the owner has the same right under like circumstances, although he became such with knowledge of the location of the road.[8] In states where it is held that the condemnation of a portion of the demised premises operates as an apportionment of the rent *pro tanto* between landlord and tenant the

[1] Chicago West Division Street R. Co. v. Metropolitan, etc. R. Co., 152 Ill. 519, 38 N. E. Rep. 736.

[2] Vernon Shell Road Co. v. Mayor, 95 Ga. 387, 22 S. E. Rep. 625.

[3] McAllister v. Reel, 59 Mo. App. 70.

[4] Turner v. State, 67 App. Div. 393, 73 N. Y. Supp. 372.

[5] Red River, etc. R. Co. v. Sture, 32 Minn. 95, 20 N. W. Rep. 229. Compare Flint, etc. R. Co. v. Gordon, 41 Mich. 420, 2 N. W. Rep. 648.

Burlington, etc. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. Rep. 125; Ellsworth, etc. R. Co. v. Gates, 41 Kan. 574, 21 Pac. Rep. 632.

[7] Norris v. Pueblo, 12 Colo. App. 290, 55 Pac. Rep. 747.

[8] Lafferty v. Railroad Co., 124 Pa. 297, 16 Atl. Rep. 869, 10 Am. St. 587, 3 L. R. A. 124; Gilmore v. Pittsburgh, etc. R. Co., 104 Pa. 275.

damages are apportioned by giving the former the value of his reversion and the rents reserved during the term, less an abatement for immediate payment, and the latter the value of the term, less the rent he has agreed to pay.[1] A lessee who makes an agreement with the lessor to cancel his lease and has not assigned his claim for damages cannot recover for such cancellation. "When he entered into the agreement with the landlord to cancel the lease, his interest was in property, a part of which had been taken, so that the remainder was of little value for the use for which it was leased. In the arrangement which he made to give up the lease the value of his interest in its damaged condition was the subject of the contract, and presumably the terms which he was able to make with the landlord were much less favorable than they would have been if the property had not been injured by the taking."[2]

The damages to a life estate may be measured by the net annual value of the premises multiplied by the tenant's expectancy of life and reduced to its present cash value.[3] The division of ownership, however, cannot operate to subject the condemning party to the payment of greater damages than if one person had a complete and perfect title.[4] If a lessee shows no other damage he can only recover the amount due his landlord for rent;[5] though he may be compensated for the loss of the landlord's covenant to renew his lease.[6] The existence of an option for the extension of a lease is not ground for recovery.[7] After a lease has been terminated by a notice to quit the tenant holding over as tenant at will cannot recover for an injury to the property caused by the opening of a street. It cannot be shown that the landlord's custom was to continue the tenancy indefinitely, and that the only reason for giving the notice to quit was the proceedings for opening the street.[8]

[1] Commissioners v. Johnson, 66 Miss. 248, 6 So. Rep. 199; Biddle v. Hussman, 23 Mo. 597; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. Rep. 746, 21 L. R. A. 212.

[2] Pegler v. Hyde Park, 176 Mass. 101, 57 N. E. Rep. 327.

[3] Pittsburgh, etc. R. Co. v. Bentley, 88 Pa. 178.

[4] Booker v. Venice & C. R. Co., 101 Ill. 333.

[5] North Pennsylvania R. Co. v. Davis, 26 Pa. 238.

[6] Seattle & M. R. Co. v. Scheike, 3 Wash. 625, 29 Pac. Rep. 217, 30 id. 503.

[7] Pause v. Atlanta, 98 Ga. 92, 26 S. E. Rep. 489, 58 Am. St. 290.

[8] Shaaber v. Reading, 150 Pa. 402, 24 Atl. Rep. 692.

But the authorities are not harmonious on this point. In Maryland the court said that the jury had a right to consider the probability of a renewal of the tenant's term because the evidence tended to show that this circumstance increased its market value, which was the measure of his damages.[1] This view is not accepted in Massachusetts. Where it appeared that the owner had been in the habit of renewing the tenant's lease from time to time the court observed that the fact added nothing except by way of corroboration to the testimony that the parties intended to keep on. "Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioner's holding they could not be taken into account in determining what the respondent should pay. They added nothing to the tenant's legal rights, and legal rights are all that must be paid for. Even if such intentions added to the salable value of the lease, the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase in value from that source."[2] The fact that the tenant has relet the damaged premises may mitigate his injury, but it does not bar a recovery.[3] If a lease may be terminated at the will of the lessor on giving thirty days' notice a verdict for nominal damages in favor of the lessee will not be interfered with.[4]

In addition to the recovery of the amount by which his interest is diminished a tenant may be compensated for the injury to or destruction of growing crops, and for the loss of buildings he erected for his own use, or for the expense of their removal if that was made necessary; but not for injuries to the buildings, trees or other improvements on the land at the time he entered upon its possession;[5] nor for the value of any buildings or other improvements which he had no right to remove without the lessor's consent. As to improvements made by

[1] Baltimore v. Rice, 73 Md. 307, 21 Atl. Rep. 181.

[2] Emery v. Boston Terminal Co., 178 Mass. 172, 185, 86 Am. St. 473, 59 N. E. Rep. 763.

[3] Witman v. Reading, 191 Pa. 134, 43 Atl. Rep. 140.

[4] Boecken v. Naperville, 166 Ill. 151, 48 N. E. Rep. 1061.

[5] Burt v. Wigglesworth, 117 Mass. 302; Burt v. Merchants' Ins. Co., id. 1; Edmands v. Boston, 108 id. 535; Matter of New Reservoir, 1 Sheldon (Buffalo Super. Ct.), 408; Ross v. Elizabethtown R. Co., 20 N. J. L. 230.

the tenant and which he was bound to deliver to the lessor in good condition, the latter takes a present estate, subject to the former's right to use during the term.[1] A life tenant cannot recover for improvements made by him for the convenience of his business, so far as they are real estate, or for the injury caused to them, so far as they are chattels, or for the loss of their use in his business.[2] If a permanent attachment made to leased premises cannot be removed and used to any advantage elsewhere, the lessee is not entitled to recover the cost of putting it up and taking it down and for damage done to it. The presumption is that the value of its use was included in the sum awarded for the leasehold.[3] A lessee who has been released from the payment of rent for the condemned premises cannot recover rents paid for other premises during the period covered by such release; neither can there be a recovery of the amount paid to employees engaged elsewhere than on the condemned premises because of a temporary suspension of business caused by the removal therefrom, especially if damages have been allowed for interruption to business.[4] The damages due a lessee cannot be reduced because his occupation of the property continued after the taking.[5]

[448] **§ 1082. Same subject.** The allowance for damages should be confined to such interest in the land as is represented by the parties to the proceeding;[6] if lessees are not parties damages cannot be allowed for injury to the leasehold estate.[7] Payment to any other than the true owner will be of no avail, and constitutes no defense to his claim.[8] It cannot be made to one tenant in common so as to affect the right of

[1] Corrigan v. Chicago, 144 Ill. 537, 33 N. E. Rep. 746, 21 L. R. A. 212.

[2] Williams v. Commonwealth, 168 Mass. 364, 47 N. E. Rep. 115.

[3] Metropolitan West Side E. R. Co. v. Siegel, 161 Ill. 638, 650, 44 N. E. Rep. 276.

[4] Id.

[5] Pegler v. Hyde Park, 176 Mass. 101, 57 N. E. Rep. 327.

[6] Indiana, etc. R. Co. v. Conness, 184 Ill. 178, 56 N. E. Rep. 402; Chicago, etc. R. Co. v. Ellis, 52 Kan. 41, 34 Pac. Rep. 352.

[7] Little Rock, etc. R. Co. v. Alister, 62 Ark. 1, 34 S. W. Rep. 82.

[8] Sherwood v. Lafayette, 109 Ind. 411, 10 N. E. Rep. 89, 58 Am. Rep. 414; Lafferty v. Railroad Co., 124 Pa. 297, 16 Atl. Rep. 869, 10 Am. St. 587, 3 L. R. A. 124; Tanner v. Kellogg, 49 Mo. 118; Missouri River, etc. R. Co. v. Owen, 8 Kan. 409; Hood v. Finch, 8 Wis. 381.

other tenants to damages;[1] nor to the landlord so as to bar the claim of his tenant.[2] One having no title cannot claim damages[3] unless he has been injured as an occupant,[4] and the title may be incidentally investigated with a view to awarding the damages to the proper persons.[5] But the condemning party may by his proceedings recognize title in a person proceeded against so as to preclude any question.[6] In one case it was held that where a railroad company applies for the appointment of a commission to ascertain the value of and condemn land needed by it for a right of way, and makes the parties in possession defendants, the latter are entitled to have the value of the land, as determined, paid to them, although third parties have given notice of their ownership of it.[7] In another case where such a company took possession of the land, disturbed the defendant and initiated the proceedings as to damages, it was not in its power to limit the scope of the proceedings to that part of the land only to which the defendant could establish a perfect title, the entire tract being used for one general purpose.[8] Where the claimant is plaintiff he must show his title.[9] Railroad companies, by virtue of their compulsory power, do not acquire absolute fee-simple title to land, but only the right to use it for their purposes; and compensation must be allowed for the value of the use so appro-

[1] Brinckerhoff v. Wemple, 1 Wend. 470.

[2] Gluck v. Mayor, etc., 81 Md. 315, 32 Atl. Rep. 515; Penney v. Commonwealth, 173 Mass. 507, 53 N. E. Rep. 865, 73 Am. St. 312. *Contra*, Shauver v. Phillips, 7 Ind. App. 12, 34 N. E. Rep. 450, holding that the only recourse of the tenant is against the landlord.

[3] Allyn v. Providence R., 4 R. I. 457; Rooney v. Sacramento R. Co., 6 Cal. 638; Robbins v. Milwaukee, etc. R. Co., 6 Wis. 636; Menot v. Cumberland County Com'rs, 28 Me. 125.

[4] Costello v. Burke, 63 Iowa, 361, 19 N. W. Rep. 247.

[5] Thurston v. Portland, 63 Me. 149; Brisbine v. St. Paul, etc. R. Co., 23 Minn. 114.

[6] Rippe v. Chicago, etc. R. Co., 23 Minn. 18; Sacramento, etc. R. Co. v. Moffatt, 7 Cal. 577.

[7] See St. Paul, etc. R. Co. v. Matthews, 16 Minn. 341; Norristown Turnpike Co. v. Burket, 26 Ind. 53; Auditor v. Crise, 20 Ark. 540; Crise v. Auditor, 17 Ark. 572; Selma R. v. Camp, 45 Ga. 180; Mt. Sterling v. Givens, 17 Ill. 255; Peoria, etc. R. Co. v. Laurie, 63 Ill. 264; Same v. Bryant, 57 Ill. 473; St. Louis, etc. R. Co. v. Teters, 68 Ill. 144; Wright v. Wisconsin R. Co., 29 Wis. 341; Chandler v. Jamaica Pond Aqueduct Co., 125 Mass. 544.

[8] Kansas City Suburban Belt R. Co. v. Norcross, 137 Mo. 415, 38 S. W. Rep. 299.

[9] Peoria, etc. R. Co. v. Bryant, 57 Ill. 473; Robbins v. Milwaukee, etc. R. Co., 6 Wis. 636.

priated. What, if anything, would be left to the land-owner of value, consistent with the enjoyment of the easement by the company, should also be considered.[1] If, however, there is no evidence of the existence either upon or beneath the surface of the land condemned of any surplus earth, stone, coal or mineral which the owner of the fee may remove, the fact that his ownership thereof is not divested is of no practical importance as affecting his damages.[2]

Where a claim has accrued for damages to an entire tract of [449] land by reason of the actual construction of a railroad over a part of it, and before the damages have been assessed or paid the land is sold without any provision in respect to them, the right to such damages remains in the vendor.[3] They belong to the owner at the time of the injury, and do not pass to a subsequent vendee[4] or to such owner's heirs.[5] It is otherwise if the claim for compensation is not ripe at the time the conveyance is made.[6] A lessor may show, on the assess-

[1] Alabama, etc. R. Co. v. Burkett, 42 Ala. 83; Neville Road Case, 8 Watts, 172; Philadelphia v. Linnard, 97 Pa. 242. See Lake Superior, etc. R. Co. v. Greve, 17 Minn. 322.

[2] Cummins v. Des Moines, etc. R. Co., 63 Iowa, 397, 19 N. W. Rep. 268.

[3] Pomeroy v. Chicago, etc. R. Co., 25 Wis. 641. See Pick v. Rubicon Hydraulic Co., 27 Wis. 433.

[4] Sargent v. Machias, 65 Me. 591; Matter of Grade Crossing Com'rs, 64 App. Div. 71, 71 N. Y. Supp. 674, affirmed without opinion, 169 N. Y. 605; Tenbrooke v. Jahke, 77 Pa. 392; Chicago, etc. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. Rep. 460; Wabash, etc. R. Co. v. McDougall, 118 Ill. 229, 8 N. E. Rep. 678; Indiana, etc. R. Co. v. Allen, 100 Ind. 409; Campbell v. Philadelphia, 108 Pa. 300; Lasch's Appeal, 109 id. 72; Smith v. Railway Co., 88 Tenn. 611, 13 S. W. Rep. 128; Little Rock, etc. R. Co. v. Allister, 68 Ark. 600, 60 S. W. Rep. 953; Midland R. Co. v. Trevarthen, 1 Colo. App. 152, 27 Pac. Rep. 1013; St. Louis, etc. R. Co. v. Nyce, 61 Kan. 394, 414, 59 Pac. Rep. 1040, 48 L. R. A. 241; Mayor, etc. v. Ewing, 116 Ala. 576, 22 So. Rep. 984. But see Caldwell v. Bank, 20 Ind. 294.

In Illinois the judgment of condemnation does not pass the title; only payment effects that. Ordinarily, if the party in whom title to land was vested when such a judgment was entered sells the land before the damages are paid, the grantee is entitled to them. Rice v. Chicago, 57 Ill. App. 558; Chandler v. Morey, 195 Ill. 596, 63 N. E. Rep. 512. But it is otherwise where the purchaser at a guardian's sale buys the land with notice that the damages awarded for opening a road across it were reserved for the ward, when they should be paid. Chandler v. Morey, *supra*.

[5] Neal v. Knox, etc. R. Co., 61 Me. 298.

[6] New Brighton v. Peirsol, 107 Pa. 280; Rice v. Chicago, 57 Ill. App. 558; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. Rep. 1022; Carli v. Stillwater, etc. R. Co., 16 Minn. 260;

ment of damages, a surrender of a lease after the land demised had been taken for a highway, with a release of the lessee's claim for damages.[1]

If land sought to be condemned for an easement is already burdened with one public servitude or private easement in a third party the imposition of another servitude of the same kind gives no right to damages;[2] but it is otherwise if there is a subsequent condemnation for a different purpose, inconsistent with or subversive of the first;[3] and in such case damages are recoverable in Maryland as though the former had not existed;[4] but the rule is otherwise in some states.[5] A plank-road laid by a company over a highway is not a different public use which will give abutting owners a right to compensation as for an additional servitude; but such company will be liable if by excavations it endangers the stability of houses on the line.[6]

§ 1083. Assessment of damages and benefits, time of. As the value of real estate is liable to be much affected generally and specially by the improvement for which it may be taken, as well as by various other causes, the inquiry at what time in the proceeding practically or legally to appropriate it are the damages to be ascertained for the purpose of just compensation, is important. Possession for public use cannot be taken, nor is the title of the owner divested, until payment is made or adequately provided for.[7] The time of the taking is that at which the value is fixed, but the cases do not agree as to [**450**] what is to be deemed the taking — whether the actual appro-

Virginia-Carolina R. Co. v. Booker, 99 Va. 633, 39 S. E. Rep. 591.

[1] Dickenson v. Fitchburg, 13 Gray, 546.

[2] In re Olean, 17 L. R. A. 640, 135 N. Y. 341, 32 N. E. Rep. 9.

[3] Story v. New York E. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Metropolitan E. R. Co., 104 N. Y. 268, 10 N. E. Rep. 528; Street R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. Rep. 936, 17 Am. St. 933.

[4] Moale v. Baltimore, 5 Md. 314, 61 Am. Dec. 276. See Pinkerton v. Boston, etc. R. Co., 109 Mass. 527.

[5] Muller v. Southern Pacific Branch R. Co., 83 Cal. 240, 23 Pac. Rep. 265; Central Branch Union Pacific R. Co. v. Andrews, 30 Kan. 590, 2 Pac. Rep. 677; Adams v. Chicago, etc. R. Co., 39 Minn. 286, 39 N. W. Rep. 629, 12 Am. St. 644, 1 L. R. A. 493.

[6] Williams v. Natural Bridge Plank Road Co., 21 Mo. 580.

[7] Daniels v. Chicago, etc. R. Co., 35 Iowa, 129, 14 Am. Rep. 490; Henry v. Dubuque, etc. R. Co., 10 Iowa, 540; Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Rider v. Stryker, 63 N. Y. 136; Cook v. South Park Com'rs, 61 Ill. 115; People v. Williams, 51 Ill. 63.

priation or the condemnation.[1] In Pennsylvania it seems to have been held that the jury should consider the matter as if called upon to estimate the injury at the moment when compensation could first be demanded,[2] that is at the date of the filing of the bond.[3] This is the difference in the value of the land before the improvement is made and after its completion;[4] that it is proper to tell the jury the market value should be ascertained before the road or the prospect of it had produced any effect upon the land, then the value immediately after the completion should be ascertained, and the difference would settle the question of damages.[5] But a later case fixes the time for awarding compensation, in the case of taking by municipal corporations, as of the time the improvement is made, not at the date of the passage of an ordinance for making it;[6] and that appears to be the rule where the taking is by a private corporation.[7] If the original entry upon the land was without right the rule which requires that the damages shall be computed as of the time the owner's title was divested does not preclude a knowledge and consideration of the condition of the land before the entry was made. The owner has a right to have his damages assessed with reference to the condition

[1] Milwaukee, etc. R. Co. v. Eble, 3 Pin. 334; Montclair R. Co. v. Benson, 36 N. J. L. 557; Miller v. Easton, etc. R. Co., 37 id. 222; Stafford v. Providence, 10 R. I. 567, 14 Am. Rep. 710; Patterson v. Boom Co., 3 Dill. 465; St. Joe, etc. R. Co. v. Orr, 8 Kan. 419; Virginia, etc. R. Co. v. Lovejoy, 8 Nev. 100; Daniels v. C. I. & N. R. Co., 41 Iowa, 52; San Francisco, etc. R. Co. v. Mahoney, 29 Cal. 112; Hosher v. Kansas City, etc. R. Co., 60 Mo. 329; Arnold v. Covington Bridge, 1 Duv. 372.

[2] Schuylkill Navigation Co. v. Thoburn, 7 S. & R. 411; Shenango, etc. R. Co. v. Braham, 79 Pa. 447; Pennsylvania, etc. R. Co. v. Bunnell, 81 id. 426; Philadelphia v. Linnard, 97 id. 242.

[3] Graham v. Pittsburgh, etc. R. Co., 145 Pa. 504, 22 Atl. Rep. 983; Rudolph v. Pennsylvania, etc. R. Co., 186 Pa. 541, 40 Atl. Rep. 1134, 47 L. R. A. 782.

[4] Hornstein v. Atlantic, etc. R. Co., 51 Pa. 87; Delaware, etc. R. Co. v. Burson, 61 Pa. 369.

[5] Id.; Long v. Harrisburg, etc. R. Co., 126 Pa. 143, 19 Atl. Rep. 39.

When the action is for consequential damages, no part of the land being taken, the right thereto accrues when the improvement is completed. Pennsylvania, etc. R. Co. v. Ziemer, 124 Pa. 560, 17 Atl. Rep. 187. Compare Rudolph v. Pennsylvania R. Co., *supra*, the facts of which varied somewhat from those of the former case.

[6] Whitaker v. Phœnixville, 141 Pa. 327, 21 Atl. Rep. 604; Philadelphia Ball Club v. Philadelphia, 192 Pa. 632, 648, 44 Atl. Rep. 265, 73 Am. St. 835, 46 L. R. A. 724; Rankin v. Pittsburgh, 7 Pa. Dist. Rep. 489.

[7] Walker v. South Chester R. Co., 174 Pa. 288, 34 Atl. Rep. 560.

of his property before the trespass was committed.[1] It is held in Mississippi that if the charter of a railroad company which wrongfully enters upon land contemplates that the owner shall be compensated at the time the land is taken, it is not entitled to have his damages assessed as of that time when it has held and used the land for years. On the application of the owner, he may have his compensation fixed as of the date of his proceeding, as the property is diminished in value, without deduction on account of any supposed benefit.[2] The same rule applies when the wrong is done by a municipality.[3] In Wisconsin a statute provided that land taken for a railroad should be appraised at its value at the time the company acquired title.[4] Under it the owner was held to be entitled to be paid the value of the property at the time of the taking; that is the just compensation of the constitution. A company having previously built its road, it was held that the improvements were to be excluded from the estimate. If the market value is enhanced at the time of the condemnation, however, the land is to be estimated at such enhanced value.[5] In Minnesota the value is required by statute to be assessed at the time of the taking, and that is construed to mean at the time of making the [451] award.[6] Compensation is given with reference to the value and condition of the premises at the time of the award. The same time is adopted in Kansas,[7] Colorado,[8] and formerly in California,[9] and in Wisconsin.[10] In Kansas and, it seems, Mis-

[1] Graham v. Pittsburgh, etc. R. Co., 145 Pa. 504, 23 Atl. Rep. 983.

[2] Louisville, etc. R. Co. v. Hopson, 73 Miss. 773, 19 So. Rep. 718.

[3] Mayor v. Higgins, — Miss. —, 33 So. Rep. 1.

[4] Laws of 1872, ch. 119, sec. 21.

[5] Aspinwall v. Chicago, etc. R. Co., 41 Wis. 474; Driver v. Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 726; West v. Milwaukee, etc. R. Co., 56 Wis. 318, 14 N. W. Rep. 292.

[6] Warren v. St. Paul, etc. R. Co., 21 Minn. 424; Sherwood v. Same, id. 122; Winona, etc. R. Co. v. Denman, 10 Minn. 267; Same v. Waldron, 11 Minn. 515; St. Paul, etc. R. Co. v. Murphy, 16 Minn. 500; Hursh v. St. Paul, etc. R. Co., 17 Minn. 439; Warren v. St. Paul, etc. R. Co., 18 Minn. 384; Morin v. Same, 30 id. 100, 14 N. W. Rep. 460; Kremer v. Chicago, etc. R. Co., 51 Minn. 15, 52 N. W. Rep. 977, 38 Am. St. 468.

[7] St. Joe, etc. R. Co. v. Orr, 8 Kan. 419.

[8] Colorado M. R. Co. v. Brown, 15 Colo. 193, 25 Pac. Rep. 87; Twin Lakes H. G. Min. Synd. v. Colorado M. R. Co., 16 Colo. 1, 27 Pac. Rep. 258.

[9] San Francisco, etc. R. Co. v. Mahoney, 29 Cal. 112; Stockton, etc. R. Co. v. Galgiani, 49 Cal. 139.

[10] Lyon v. Green Bay, etc. R. Co., 42 Wis. 543.

souri, if the entry is made without consent and condemnation proceedings are not instituted until afterward the assessment will be made as of the time possession was first taken;[1] and so in Alabama.[2] For convincing reasons it is otherwise in Texas.[3] In California and Idaho the assessment, by virtue of statute, is to be made as of the date of the summons;[4] but in case of the change of the grade of a street it is to be made as of the time the change was made, and not as of the date of the enactment of the ordinance authorizing the change.[5] In Utah the statutory direction is that the assessment shall be made as of the date of the summons; but in proceedings to condemn land held under a deed of trust as security the value of the land will be fixed as of the date of entering appearance of the trustee, and not of the date of the summons against the debtor, the trustee not being served.[6] In Illinois the assessment is to be made as of the time the petition for condemnation is filed.[7] In Nebraska, Missouri, Ohio, Indiana and Tennessee the time when proceedings are instituted governs the parties' rights;[8] and so in Arkansas.[9] It was formerly held in the latter state

[1] Wier v. St. Louis, etc. R. Co., 40 Kan. 130, 19 Pac. Rep. 316; McElroy v. Kansas City, etc. R. Co., — Mo. —, 72 S. W. Rep. 913.

[2] Jones v. New Orleans & S. R. Co., 70 Ala. 227.

[3] Texas Western R. Co. v. Cave, 80 Tex. 137, 15 S. W. Rep. 786. See Gulf, etc. R. Co. v. Brugger, 24 Tex. Civ. App. 367, 59 S. W. Rep. 556.

[4] San Jose & A. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. Rep. 522; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Spokane & P. R. Co. v. Lieuallen, 2 Idaho, 1101, 29 Pac. Rep. 854.

[5] Bancroft v. San Diego, 120 Cal. 432, 52 Pac. Rep. 712.

[6] Oregon Short Line, etc. R. Co. v. Mitchell, 7 Utah, 505.

[7] South Park Com'rs v. Dunlevy, 91 Ill. 49; Dupuis v. Chicago, etc. R. Co., 115 id. 97, 3 N. E. Rep. 720.

If the petition is amended solely for the purpose of making the description of the property more exact, the assessment should be made as of the time the original petition was filed. Lieberman v. Chicago, etc. R. Co., 141 Ill. 140, 30 N. E. Rep. 544.

[8] Missouri Pacific R. Co. v. Hays, 15 Neb. 224, 18 N. W. Rep. 51; Logansport, etc. R. Co. v. Buchanan, 52 Ind. 163; Lafayette, etc. R. Co. v. Murdock, 68 id. 137; Alloway v. Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 8 L. R. A. 123; Fremont, etc. R. Co. v. Bates, 40 Neb. 381, 58 N. W. Rep. 959; Harlan County v. Hogsett, 60 Neb. 362, 83 N. W. Rep. 171; Kansas City Suburban Belt R. Co. v. Norcross, 137 Mo. 415, 38 S. W. Rep. 299 (it is ruled in Ragan v. Kansas City & S. R. Co., 144 Mo. 623, 638, 46 S. W. Rep. 602, that the damages are to be assessed as of the time of the taking and appropriation); Schaible v. L. S. & M. S. R. Co., 10 Ohio Dec. 334 (notwithstanding the premises were damaged before that time; for such damage the owner may recover in a proper action).

[9] Newgass v. Railway Co., 54 Ark. 140, 15 S. W. Rep. 188.

that "where the assessment of the damages precedes the building of" a railroad "the presumption is that it will be built with skill and proper precautions. But if the road has been completed through the land at the date of trial the jury may consider the state of facts then existing and, with the light afforded by the actual construction, determine what the damage has been."[1] In Massachusetts the statute declares that "the damages for land taken shall be fixed at the value thereof before" the taking. This has been sustained as valid. The doctrine of several cases ruled under it has been thus stated. "The owner of land taken for public use cannot recover therefor an enhanced value which it has acquired merely by reason of the taking, or as the result of the improvement which the taking of that particular land for the specific purpose for which it is taken contemplates; for from the very nature of things its appropriation is a condition precedent to the existence of the improvement, and it cannot share in the effect of the change to create which it must be used." Hence, where a statute authorized the taking of designated property for a specific purpose the value of it was fixed as of the time the statute was enacted, and not a year later when the actual taking occurred.[2] In Iowa "it is the general rule that the damages are to be assessed as of the time when the commissioners make their appraisement, if the company proceeds under the assessment with reasonable diligence, and that the values as they existed at that time are to control on appeal."[3]

In New York, whenever the legislature locates by metes and bounds the lands to be taken, and they are declared to be taken by the statute, the compensation is to be awarded as of the time of the taking.[4] But if the legislature, though describing the land by metes and bounds and directing that it shall be devoted to a public purpose, leaves uncertain what particular portion of the land is to be taken, but refers the question to a body which may exercise its discretion, there is no appropria-

[1] Springfield & M. R. v. Rhea, 44 Ark. 258.

[2] Mowry v. Boston, 173 Mass. 425, 53 N. E. Rep. 885. See May v. Boston, 158 Mass. 21, 32 N. E. Rep. 902; Dickenson v. Fitchburg, 13 Gray, 546; Reed v. Hanover Branch R. Co., 105 Mass. 303.

[3] Ellsworth v. Chicago, etc. R. Co., 91 Iowa, 386, 59 N. W. Rep. 78, and cases cited.

[4] Matter of the Application of the Mayor, 99 N. Y. 569.

tion until final action by such body.[1] The general rule is that the date of the award fixes the rights of the parties.[2] In New Jersey if the land-owner permits a railroad company to lay tracks without making compensation, and the question of making it thereafter arises in equity, the value of the land and the damages at the time of the entry, with interest, measures the recovery. If the company takes the statutory proceedings to condemn the land its value and the damages at the time of the appraisement may be recovered.[3] In Vermont the value of land taken for a highway is to be fixed as of the date of the proceedings before the selectmen.[4] In Kentucky if the condemning party refuses to pay the damages assessed and appeals the assessment will be made as of the time of the trial of the appeal.[5] In Connecticut the appraisal and assessment, where a municipality improves streets, may be made, at its option, before or after the execution of the work or during its progress.[6] Under a statute providing that damages resulting from a street improvement shall be fixed at the value of the property before the laying out, alteration or widening of the street, the assessment must be made without allowing anything for the increase in the value of the land which arose from the expectation that it would be taken.[7] Where the government entered wrongfully on a tract of land and erected a building which became part of the realty and then took proceedings to condemn the land for public use, it was held that the owner had a right to have the value of the structure allowed him in the estimate of the damages.[8] This doctrine is not generally recognized.[9]

[452] **§ 1084. Deduction for benefits.** By measuring the damages according to the depreciation in market value the con-

[1] Matter of the Department of Public Parks, 53 Hun, 280, 6 N. Y. Supp. 750; Matter of the Mayor, 24 App. Div. 7, 49 N. Y. Supp. 119.

[2] Matter of New York E. R. Co., 76 Hun, 384, 28 N. Y. Supp. 110.

[3] Trimmer v. Pennsylvania, etc. R. Co., 55 N. J. L. 46, 25 Atl. Rep. 932.

[4] Lloyd v. Fair Haven, 67 Vt. 167, 31 Atl. Rep. 164.

[5] L. & N. R. Co. v. Asher, 10 Ky. L. Rep. 1021 (Ky. Super. Ct.).

[6] Peck v. Bristol, 74 Conn. 483, 51 Atl. Rep. 521.

[7] Benton v. Brookline, 151 Mass. 250, 23 N. E. Rep. 846.

[8] United States v. Land in Monterey County, 47 Cal. 515. But see California Pacific R. Co. v. Armstrong, 46 Cal. 85; Emerson v. Western Union R. Co., 75 Ill. 176; Graham v. Connersville, etc. R. Co., 36 Md. 463; Aspinwall v. Chicago, etc. R. Co., 41 Wis. 474; Justice v. Nesquehoning Valley R. Co., 87 Pa. 28.

[9] § 1076.

demning party will get the benefit of any advance in the price of the land as a whole produced by the improvement at the time the inquiry as to value is made. The value taken before the appropriation is supposed to be uninfluenced by the projected improvement. The value after it is completed is the value as affected by it; if enhanced, the increase cancels the damage *pro tanto;* if it has the contrary effect the diminution adds to the special damage for taking a part and inconveniencing the owner as to the residue. Where damages are assessed for anticipated depreciation by proof of particular facts no account is taken of the general benefits of the improvement; on the contrary, they are purposely excluded.[1] And so of any common injury which affects the community or public at large.[2] Only those benefits are considered which are special and affect particularly the land in question,[3] which result from the improvement for which the land is taken[4] and

[1] Meacham v. Fitchburg R. Co., 4 Cush. 291; Fuller v. Mount Vernon, 171 N. Y. 247, 63 N. E. Rep. 964.

[2] Petition of Mount Washington Road Co., 35 N. H. 146; Adden v. White Mts. N. H. R., 55 N. H. 415, 20 Am. Rep. 220.

[3] Weir v. St. Paul, etc. R. Co., 18 Minn. 155; Wood v. Hudson, 114 Mass. 513; Symonds v. Cincinnati, 14 Ohio, 148; Paine v. Woods, 108 Mass. 168; Palmer Co. v. Ferrill, 17 Pick. 58; Green v. Fall River, 113 Mass. 262; Dwight v. Hampden, 11 Cush. 201; Meacham v. Fitchburg R. Co., 4 Cush. 291; Young v. Harrison, 17 Ga. 30; Trinity College v. Hartford, 32 Conn. 452; Hilbourne v. Suffolk, 120 Mass. 393, 21 Am. Rep. 522; Hyde Park v. Washington Ice Co., 117 Ill. 233, 7 N. E. Rep. 523; Whitely v. Mississippi, etc. Boom Co., 38 Minn. 523, 38 N. W. Rep. 753; Omaha v. Schaller, 26 Neb. 522, 42 N. W. Rep. 721; Newman v. Metropolitan E. R. Co., 118 N. Y. 618, 23 N. E. Rep. 901, 7 L. R. A. 289; Pittsburgh, etc. R. Co. v. McCloskey, 110 Pa. 436, 1 Atl. Rep. 555; G., C. & S. F. R. v. Fuller, 63 Tex. 467; Childs v. New Haven & N. Co., 133 Mass. 253; Washington Ice Co. v. Chicago, 147 Ill. 327, 35 N. E. Rep. 378, 37 Am. St. 322; Smith v. St. Joseph, 122 Mo. 643, 27 S. W. Rep. 344; Dayton v. Lincoln, 39 Neb. 74, 57 N. W. Rep. 754; Mangles v. Chosen Freeholders, 55 N. J. L. 88, 25 Atl. Rep. 322; Lewiston & Y. Frontier R. Co. v. Ayer, 27 App. Div. 571, 50 N. Y. Supp. 502; Blair v. Charleston, 43 W. Va. 62, 26 S. E. Rep. 341, 64 Am. St. 837, 35 L. R. A. 852; Monongahela Navigation Co. v. United States, 148 U. S. 312, 326, 13 Sup. Ct. Rep. 622; Little Rock, etc. R. Co. v. Allister, 68 Ark. 600, 60 S. W. Rep. 953; Lake Roland E. R. Co. v. Frick, 86 Md. 259, 37 Atl. Rep. 650; Homer v. Duluth, 70 Minn. 378, 73 N. W. Rep. 176.

[4] In re New York, etc. R. Co., 49 Hun, 539, 2 N. Y. Supp. 478; Herrmann v. East St. Louis, 58 Ill. App. 166; Butler v. Same, 74 id. 649; Cole v. St. Louis, 132 Mo. 633, 34 S. W. Rep. 469.

The terms "general benefits," "benefits common to other property," and other like expressions used by courts have recently been defined in an Illinois case from which ex-

affect its market value or use, and such as can be computed.[1] Benefits already accrued by reason of previous improvements are not to be considered when a subsequent condemnation is [453] sought.[2] These benefits are estimated like the damages.[3] Benefits to the land-owner's business cannot be set off,

cerpts are made: Property may be specially benefited by an improvement, and at the same time other property, upon the same improvement, be likewise specially benefited. This may be illustrated by the assessment of special benefits for a local improvement. Presumably all the property along the line of the improvement will be more or less specially benefited — that is, benefited beyond the general benefit supposed to diffuse itself from the improvement throughout the municipality ordering it made. If property is enhanced in value by reason of the improvement, as distinguished from the general benefits to the whole community at large, it is said to be specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may be, to a greater or less degree, likewise specially benefited. Wilson v. Board of Trustees, 133 Ill. 443, 27 N. E. Rep. 203. In other words, it is not such benefit as is special to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but is such benefits as that the particular property is by the improvement enhanced in value,—that is, specially benefited. If a piece of property is enhanced in value, such enhancement — or, in other words, benefit to the property — cannot be said to be common to any other piece of property. Each piece of property specially enhanced in value is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows, necessarily, that where the benefits are designated as "general benefits," "benefits common to other property," and the like expressions to be found in decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. Metropolitan West Side E. R. Co. v. Stickney, 150 Ill. 362, 370, 26 L. R. A. 773, 37 N. E. Rep. 1098; Same v. White, 166 Ill. 375, 46 N. E. Rep. 978. Compare Herrmann v. East St. Louis, 58 Ill. App. 166. The opinion quoted from has been approved in Blair v. Charleston, 43 W. Va. 62, 26 S. E. Rep. 341, 64 Am. St. 837, 35 L. R. A. 852. Aswell v. Scranton, 175 Pa. 173, 34 Atl. Rep. 656, 52 Am. St. 841, is in harmony. See § 1085.

[1] Metropolitan West Side E. R. Co. v. White, 166 Ill. 375, 46 N. E. Rep. 978.

[2] Gulf, etc. R. Co. v. Brugger, 24 Tex. Civ. App. 367, 59 S. W. Rep. 556; Guyer v. Davenport, etc. R. Co., 196 Ill. 370, 63 N. E. Rep. 732.

[3] Trinity College v. Hartford, 32 Conn. 452; Railroad Co. v. Tyree, 7 W. Va. 693; St. Louis, etc. R. Co. v. Richardson, 45 Mo. 466; Winona, etc. R. Co. v. Waldron, 11 Minn. 515; Weir v. St. Paul, etc. R. Co., 18 Minn. 155; Mitchell v. Thornton, 21 Gratt. 164; Hosher v. Kansas City, etc. R. Co., 60 Mo. 329; Quincy R. Co. v. Ridge, 57 Mo. 599: Lee v. Tebo R. Co., 53 Mo. 178; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Pacific R. v. Chrystal, 25 Mo. 544; Freedel v. North Carolina R. Co., 4 Jones, 89; James River & K. Co. v. Turner,

but his business may be considered in so far as the value of the real estate and the benefits received by it were affected by its adaptedness to be used in the business.[1] The benefits resulting to a homestead from the improvement of a street are not to be assessed on the basis that might be proper if it were business property, it not appearing that it was the intention of the owner to change its use.[2] If special benefits have been set off in a proceeding to condemn a street the same property is not subject to be assessed therefor in a proceeding to raise money to pay for the property taken or damaged.[3] Where land was condemned for bridge purposes and its owner was paid for the damage sustained, less the benefits resulting, and there was subsequently made a change in the plans of the bridge company in consequence of which additional land was taken from the same owner, the benefits resulting to him from the original construction of the bridge were not involved in the second condemnation. So far as that was concerned the inquiry was limited to the damages sustained and the benefits resulting by the change of plans.[4]

It is the business of the tribunal to which the ascertainment of just compensation is confided to balance the advantages that are special against the disadvantages that are actual, and with the aid of whatever testimony is laid before it to find out, as far as practicable, how much less the land would bring in the market by reason of the improvement in question, and that sum will represent what has been really taken away from the owner and should be given back in damages.[5] If this special benefit is equal to the compensation that the owner should

9 Leigh, 313; Lake Shore, etc. R. Co. v. Baltimore & O. R. Co., 149 Ill. 272, 37 N. E. Rep. 91.

[1] Hamilton v. Pittsburg, etc. R. Co., 190 Pa. 51, 42 Atl. Rep. 369; Butchers' Slaughtering & Melting Ass'n v. Commonwealth, 169 Mass. 103, 118, 47 N. E. Rep. 599. See Guinn v. Ohio River R. Co., 46 W. Va. 151, 33 S. E. Rep. 87, 76 Am. St. 806.

[2] Dallas v. Kahn, 9 Tex. Civ. App. 19, 29 S. W. Rep. 98.

[3] Leopold v. Chicago, 150 Ill. 568, 37 N. E. Rep. 892. See Fuller v. Mount Vernon, 171 N. Y. 247, 63 N. E. Rep. 964.

[4] McElheny v. McKeesport & D. Bridge Co., 153 Pa. 108, 25 Atl. Rep. 1021.

[5] Hornstein v. Atlantic, etc. R. Co., 51 Pa. 87; Boston, etc. R. Co. v. Old Colony R. Corp., 12 Cush. 605; Hagaman v. Moore, 84 Ind. 496; Atlanta v. Green, 67 Ga. 386; Monroe v. Atlanta, 70 id. 611; Pittsburgh, etc. R. Co. v. Robinson, 95 Pa. 426.

otherwise receive he will be entitled to nothing else.[1] The assessment for benefits must be limited to the damages awarded for the property taken or injured.[2] In estimating benefits the test applied is not the number of lots or tracts benefited, but the relation of the lands to the improvement and its specific effect upon their value.[3] If the contention is made that the damages are offset in whole or in part by some special and peculiar benefit caused to the property affected by the improvement, the fair and reasonable cost of making such benefit practically available is to be taken into account in ascertaining the amount of benefit to be offset.[4] The city of New York may, where it has condemned property, deduct from the award taxes which were a lien against the property condemned,[5] and interest thereon from the day the award became payable.[6] But it is otherwise as to taxes levied intermediate the award of commissioners and its confirmation.[7] In appraising property taken by such city under chapter 152, laws of 1894, there should be added to the award interest thereon and taxes from the date the property was appropriated to the time when the award was made, but there should be deducted rentals received by the owner during that time, or, if none were received, the value of the use and occupation of the premises.[8]

§ 1085. Same subject. Where an assessment was made for damages for flowing lands by means of a dam it was held that the benefit resulting to the lot flowed and the adjoining

[1] Whitman v. Boston, etc. R. Co., 3 Allen, 133; Trinity College v. Hartford, 32 Conn. 452; Washington Ice Co. v. Chicago, 147 Ill. 327, 35 N. E. Rep. 378, 37 Am. St. 222; Chicago, etc. R. Co. v. Wolf, 147 Ill. 360, 27 N. E. Rep. 78; Metropolitan West Side E. R. Co. v. Stickney, 150 Ill. 362, 37 N. E. Rep. 1098, 26 L. R. A. 773; Hurt v. Atlanta, 100 Ga. 274, 280, 28 S. E. Rep. 65; Guinn v. Ohio River R. Co., 46 W. Va. 151, 33 S. E. Rep. 87, 76 Am. St. 806; Aswell v. Scranton, 175 Pa. 173, 34 Atl. Rep. 656, 52 Am. St. 841.

[2] Wilmington & W. R. Co. v. Smith, 99 N. C. 131, 5 S. E. Rep. 237.

[3] Rich v. New York E. R. Co., 16 Daly, 518, 14 N. Y. Supp. 167; Gray v. Manhattan R. Co., 16 Daly, 510, 12 N. Y. Supp. 542.

[4] Butchers' Slaughtering & Melting Ass'n v. Commonwealth, 163 Mass. 386, 40 N. E. Rep. 176.

[5] Carpenter v. New York, 44 App. Div. 230, 60 N. Y. Supp. 633.

[6] S. C., 51 App. Div. 584, 64 N. Y. Supp. 839.

[7] Matter of Board of Education, 169 N. Y. 456, 62 N. E. Rep. 566.

[8] Matter of Riverside Park, 59 App. Div. 603, 69 N. Y. Supp. 742, affirmed without opinion, 167 N. Y. 627.

land from the formation of ice on it in the ordinary use of the dam, where such ice might be cut and sold as merchandise without appreciably diminishing the water-power for which the dam was erected, might be considered, and also benefits resulting to the same land by reason of the greater convenience afforded the owner by means of the flowing, and through the use of his land to exercise his right in common with the public to take ice from a natural pond by which the overflowed land was bounded.[1] But where the establishment of a road rendered the building of fences necessary the damages allowed for the appropriation of the land, it was held, should not be diminished by the value of any advantages which might accrue to the adjacent property from the erection of the fences.[2] Benefits of two kinds may accrue to lands bounding on a way laid out, altered or widened: First, the special and direct benefit arising from its own position upon the [454] way itself; and second, the general benefit, not arising from such location, but from the facilities and advantages caused by the way which affect all the estates in the neighborhood equally and which are shared in common with such estates. The direct and peculiar benefit may be set off against the damages. The general benefit cannot.[3] The advantages that an abutter may receive from his location on a highway laid out, altered or widened are none the less peculiar and special to him because other estates on the street receive special and peculiar benefits of the same kind.[4] If a lot is drained or fer-

[1] Paine v. Woods, 108 Mass. 160.

[2] Bland v. Hixenbaugh, 39 Iowa, 532.

[3] Hilbourne v. Suffolk, 120 Mass. 393, 21 Am. Rep. 522; Carpenter v. Landaff, 42 N. H. 218; Shawneetown v. Mason, 82 Ill. 337, 25 Am. Rep. 321; Commissioners v. Johnston, 71 N. C. 398.

In Greenville & C. R. Co. v. Partlow, 5 Rich. 436, the charter of the company directed that the commissioners or jury, "in making the valuation, shall take into consideration the loss or damage which may occur to the owner in consequence of the land or right of way being taken, and also the benefit or advantage he may receive from the establishment or erection of the railroad or works, and shall state particularly the nature and amount of each; and the excess of loss or damage, over and above the benefit and advantage, shall form the measure of valuation of said land or right of way." This was held to include general as well as special benefits.

[4] Hagaman v. Moore, 84 Ind. 496; Trosper v. Commissioners, 27 Kan. 391; Hilbourne v. Suffolk, *supra;* Allen v. Charlestown, 109 Mass. 243; Kirkendall v. Omaha, 39 Neb. 1, 57 N. W. Rep. 752; Barr v. Omaha, 42

tilized by a public improvement the benefit is direct and [455] special;[1] so if it discontinues a portion of an old highway, the part vacated thereby inuring to the person to be compensated.[2]

§ 1086. Same subject. In New Hampshire it is held that in estimating damages from the opening of a highway nothing can be deducted on account of benefits not special to the particular owner to be compensated; and where he obtained access to his land, he not having access otherwise, except across land which he did not own, such benefit is not special. The court said this was not a benefit for which he should pay, but a general improvement in which many would share.[3] In Illinois, as a set-off against consequential damages arising from a railroad crossing a farm, it was held proper to take into consideration the facilities afforded by the road, and a convenient depot for getting the products of the farm to market, as also the actual increase in the market value of the farm occasioned by the road.[4] In Wisconsin the benefit which may be allowed must enhance the value of the land affected by improving its physical condition and adaptability for use.[5] In the case

Neb. 341, 60 N. W. Rep. 591; Dallas v. Kahn, 9 Tex. Civ. App. 19, 29 S. W. Rep. 98. But see Whitcher v. Benton, 50 N. H. 25, and Trinity College v. Hartford, 32 Conn. 476, and note 4, p. 3189.

In Missouri "it has been ruled from the beginning that the benefits to be deducted from the damages sustained by the land-owner by the taking or damaging his property is only the direct and peculiar benefit that would result in particular to his tract, and not the general benefit that his lands would derive in common with the lands of other owners in his neighborhood." Cole v. St. Louis, 132 Mo. 633, 640, 34 S. W. Rep. 469, and local cases cited. See Rives v. Columbia, 80 Mo. App. 173.

A statute providing for the deduction of benefits which will result from the laying out of a road means not the benefits to result from the road when improved as is directed in the statute, but those resulting from the road as it is laid out. Mangles v. Chosen Freeholders, 55 N. J. L. 88, 25 Atl. Rep. 322.

[1] Washburn v. Milwaukee, etc. R. Co., 59 Wis. 364, 376, 18 N. W. Rep. 328; Milwaukee R. Co. v. Eble, 3 Pin. 334; Butchers' Slaughtering & Melting Ass'n v. Commonwealth, 169 Mass. 103, 47 N. E. Rep. 599.

[2] Tingley v. Providence, 8 R. I. 493.

[3] Carpenter v. Landaff, 42 N. H. 218; Whitcher v. Benton, 50 N. H. 25; Adden v. White Mts. N. H. R., 55 N. H. 413, 20 Am. Rep. 220, approved in Little Rock, etc. R. Co. v. Allister, 68 Ark. 600, 60 S. W. Rep. 953. See Virginia, etc. R. Co. v. Lynch, 13 Nev. 92.

[4] Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Hayes v. Ottawa, etc. R. Co., 54 id. 373.

[5] Washburn v. Milwaukee, etc. R. Co., 59 Wis. 364, 376, 18 N. W. Rep. 328.

in which this was held the question was as to the advantage of the location of a railroad depot. In Massachusetts such a benefit has sometimes been considered special,[1] and so in Pennsylvania,[2] though the question is for the jury.[3] Where compensation was claimed for the location and construction of a railroad between coal mines and a navigable river on the landowner's premises, whereby the conveniences of river transportation for getting the coal to market were injured or [456] cut off, it was held competent for the railroad company to show, for the purpose of reducing the damages,[4] that the river transportation, in connection with the coal banks, had ceased to be valuable or become of less value by means of the facilities for coal transportation afforded by the railroad. In case of a railroad appropriation for a right of way through a tract of land, causing incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue of the land is prohibited from being taken into account in estimating the amount of compensation to be paid the owner, yet where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with the local incidental injury to such residue, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done to the value of the residue of the land.[5]

There must be a reasonable degree of certainty that benefit will result from the public improvement.[6] Hence, the mere possibility that other streets may be laid through or near the property in question by the public authorities and it thereby be rendered more valuable is not to be considered because such streets may never be opened, and if they are, the landowner is liable to have his property assessed for the benefits which accrue to him.[7] But if the opening of a particular street enables the owner of land to lay out another street or streets

[1] Shattuck v. Stoneham Branch R., 6 Allen, 115. See Childs v. New Haven & N. Co., 133 Mass. 253.

[2] Pittsburgh, etc. R. Co. v. Robinson, 95 Pa. 426.

[3] Gorgas v. Philadelphia, etc. R. Co., 144 Pa. 1, 22 Atl. Rep. 715.

[4] Cleveland & P. R. Co. v. Ball, 5 Ohio St. 569.

[5] Id.

[6] Washington Ice Co. v. Webster, 147 Ill. 327, 35 N. E. Rep. 378, 37 Am. St. 222.

[7] Alleghany v. Black, 99 Pa. 152.

upon it, thereby increasing his available frontage and the market value of his property, it will be assumed that he will do so, and the resulting benefit may be considered.[1] If the property taken or injured is held in different interests the parties can be charged with the benefit resulting only in proportion to their interests.[2]

§ 1087. Same subject. No deduction can be made for benefits without legislative authority.[3] On doubtful ground the existence of such authority in congress is denied in a late case.[4] On the other hand, it has been decided in North Carolina that it is competent for the legislature to provide that all benefits, general as well as special, shall be considered.[5] In many states benefits are excluded by constitution or statute from consideration in determining what shall be paid for the *value* of property taken for public use; but the inhibition in this form has not always been deemed to exclude this consideration in reduction of consequential damages resulting from the appropriation. In other states the same restricted application of benefits is made on general principles as proper and necessary to give "just compensation."[6] The rule that the

[1] Id.

[2] Turnpike Road v. Brosi, 22 Pa. 29.

[3] District of Columbia v. Prospect Hill Cemetery, 5 D. C. App. Cas. 497, 518.

[4] Maryland & W. R. Co. v. Hiller, 8 D. C. App. Cas. 289. See Monongahela Navigation Co. v. United States, 148 U. S. 312, 326, 13 Sup. Ct. Rep. 622, remarks in which are relied upon in the opinion in the principal case. To the same effect is District of Columbia v. Armes, 8 D. C. App. Cas. 393. Shoemaker v. United States, 147 U. S. 282, 302, 13 Sup. Ct. Rep. 361, which holds that it is competent for Congress, in providing for the cost of a public park, to direct that a proportionate cost of it shall be assessed upon property specially benefited, is not referred to in the District of Columbia cases cited.

[5] Miller v. Asheville, 112 N. C. 759, 16 S. E. Rep. 762. See n. 3, p. 3193.

[6] Todd v. Kankakee R. Co., 78 Ill. 530; Carpenter v. Jennings, 77 Ill. 250; Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Hayes v. Ottawa, etc. R. Co., 54 Ill. 373; Raleigh R. Co. v. Wicker, 74 N. C. 220; Shipley v. Baltimore, etc. R. Co., 34 Md. 336; Railroad Co. v. Tyree, 7 W. Va. 693; Mitchell v. Thornton, 21 Gratt. 164; Augusta v. Marks, 50 Ga. 612; Atlanta v. Central R. Co., 53 Ga. 120; Vicksburg, etc. R. Co. v. Calderwood, 15 La. Ann. 481; Buffalo, etc. R. Co. v. Ferris, 26 Tex. 588; New Castle R. Co. v. Brumback, 5 Ind. 543; Memphis v. Bolton, 9 Heisk. 508; Giesy v. C., W. & Z. R. Co., 4 Ohio St. 330; Wagner v. Gage Co., 3 Neb. 237; Woodfolk v. Nashville, etc. R. Co., 2 Swan, 422; Chapman v. Oshkosh, etc. R. Co., 33 Wis. 629; Newby v. Platte County, 25 Mo. 258; Commissioners v. O'Sullivan, 17 Kan. 58; Harwood v. Bloomington, 124 Ill. 152, 16 N. E.

damage to land actually taken cannot be reduced by considering benefits applies to all kinds of property, rights in property and the uses of property of which the owner will be deprived.[1] In California the language of the constitution, "irrespective of any benefit from any improvement proposed by such corporation," is not limited to the land taken by a railroad company, but extends to benefits which may accrue to the land not taken, and the amount of damages thereto must be fixed irrespective of any benefit which may result to the land-owner from the improvement.[2] This is the rule in several states.[3] It applies to counties which take lands for highway purposes. A county is not a municipal corporation within the meaning of a clause in the constitution excepting such corporations from the operation of the clause quoted.[4] In Washington a railroad company authorized by a city to construct its road on certain streets occupies the same position as the city would had it done the work, and may offset benefits resulting to abutting property owners by virtue of a clause in the constitution allowing municipalities that right; but damages caused by operating the road cannot be set off.[5] In Iowa the principle excluding benefits applies to all cases.[6]

Rep. 91, 7 Am. St. 350; Wichita & W. R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. Rep. 75; Fremont, etc. R. Co. v. Whalen, 11 Neb. 585, 10 N. W. Rep. 491; St. Louis, etc. R. Co. v. Anderson, 39 Ark. 167; Lake Shore, etc. R. Co. v. Baltimore & O. R. Co., 149 Ill. 272, 37 N. E. Rep. 91; Leopold v. Chicago, 150 Ill. 568, 37 N. E. Rep. 892; Ginn v. Moultrie, etc. Drainage District, 188 Ill. 305, 58 N. E. Rep. 988; Martin v. Fillmore County, 44 Neb. 719, 62 N. W. Rep. 863; Dulaney v. Nolan County, 85 Tex. 225, 20 S. W. Rep. 70.

[1] Metropolitan West Side E. R. Co. v. Springer, 171 Ill. 170, 178, 49 N. E. Rep. 416.

[2] Pacific Coast R. Co. v. Porter, 74 Cal. 261, 15 Pac. Rep. 774; Muller v. Southern Pacific B. R. Co., 83 Cal. 245, 23 Pac. Rep. 265; San Bernardino & E. R. Co. v. Haven, 94 Cal. 489, 29 Pac. Rep. 875; San Jose & A. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. Rep. 522.

[3] Giesy v. Cincinnati, etc. R. Co., 4 Ohio St. 308; Little Miami R. Co. v. Collett, 6 Ohio St. 182; Cincinnati, etc. R. Co. v. Longworth, 30 Ohio St. 108; St. Louis, etc. R. v. Anderson, 39 Ark. 167 (see Little Rock, etc. R. Co. v. Allister, 68 Ark. 600, 60 S. W. Rep. 953); Springfield, etc. R. v. Rhea, 44 Ark. 258; St. Joseph, etc. R. v. Orr, 8 Kan. 419; Reisner v. Union Depot

[4] San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. Rep. 78, 621.

[5] Kaufman v. Tacoma, etc. R. Co., 11 Wash. 632, 40 Pac. Rep. 137.

[6] Haggard v. Independent School District, 113 Iowa, 486, 495, 85 N. W. Rep. 777.

In Kentucky the right to just compensation for property taken for public use is held to exclude all benefits in reduction [457] of the value of the property taken, and to limit their application to the reduction of damages resulting from such taking. In an early case the court said: "When the property of one citizen is taken without his consent for the use of the whole community of which he is a member the constitution imperiously requires, not that the public shall decide whether he is entitled to any compensation, but that the just compensation shall be paid or secured; and that compensation implies the value at least of the thing taken. No citizen can be compelled to give his land to the public without an equivalent; and what is that equivalent but the value in money of the land surrendered to the public use? He may act unreasonably and unjustly in an imaginable case by insisting on pecuniary compensation, or in refusing to make a surrender without exacting the value of the property. But he has a right to insist on being paid the value of the thing taken from him, although he may be incidentally benefited with others in the appropriation of it to public use. If, however, claiming more than the value of the property taken, he seeks indemnity for consequential inconvenience or injury, then the true question will be whether, upon a survey of all advantages as well as disadvantages which will be likely to result to him, the balance will be for or against him; and if ascertained to be in his favor, then, of course, he will be entitled to nothing for alleged damages for such inconvenience or injury because, the whole case being properly considered in all its bearings, he will sustain no damage. Thus, and only thus, advantages and disadvantages may be compared and set off the one against the other."[1] This view has been adhered to.[2] The compensation guarantied by the constitution, it is there insisted, cannot consist of the mere estimate of a jury or appraisers of the prospective and speculative advantages which in their opinion

& R. Co., 27 Kan. 382; Florence, etc. R. Co. v. Shepherd, 50 Kan. 438, 31 Pac. Rep. 1002; Alabama, etc. R. Co. v. Burkett, 42 Ala. 83; Enoch v. Spokane Falls & N. R. Co., 6 Wash. 393, 33 Pac. Rep. 966, overruling Northern Pacific, etc. R. Co. v. Coleman, 3 Wash. 234, 28 Pac. Rep. 514; Britton v. D. M., O. & S. R. Co., 59 Iowa, 540, 13 N. W. Rep. 710.

[1] Sutton's Heirs v. Louisville, 5 Dana, 33.

[2] Rice v. Turnpike Co., 7 Dana, 87.

will accrue to the owner from the proposed use of his land by the public, but must be a pecuniary compensation equivalent to the value of the land to be taken. These advantages may be set off against the consequential damages and inconvenience which the owner may sustain, but not against the [458] value of the land itself. To that extent at least he is entitled, under all circumstances, to a specific compensation without deduction or set-off.[1] This mode of adjusting the compensation is deemed to be the true and only effectual exposition of the constitution.[2] There is this other distinguishing feature of the law as held in that state: advantages which may offset the consequential damages are not confined to those which are special to the land from which a part is taken. The advantages which the owner may derive from the construction of a railroad, for instance, are not in the least diminished by the fact that they will be enjoyed by others, nor does that furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from its establishment. Other persons, it is true, may enjoy the same advantages without being subjected to the same inconveniences; but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes.[3]

The value which the constitution of Kentucky guaranties is the value to the owner, where the property taken is a part of a greater tract; and it is to be estimated by considering its relative position to his other land and the circumstances which may diminish or enhance that value; the real value of the land to the owner as it is actually situated, and not merely regarding it as a separate and independent piece of land, he has a right to demand. It is held that nothing else can secure him just compensation. The inquiry should be, what is its value, situated as it is, if he were not the owner of it, but owned adjacent property on both sides of it, under precisely

[1] Id.; Elizabethtown, etc. R. Co. v. Helm's Heirs, 8 Bush, 681; Asher v. L. & N. R. Co., 87 Ky. 391, 8 S. W. Rep. 854.

[2] Jacob v. Louisville, 9 Dana, 114; Henderson, etc. R. Co. v. Dickerson, 17 B. Mon. 178, 66 Am. Dec. 148.

[3] Henderson, etc. R. Co. v. Dickerson, *supra;* Louisville, etc. R. Co. v. Thompson, 18 B. Mon. 744–5; Same v. Glazebrook, 1 Bush, 325.

the same circumstances?[1] "This question of value," the court say, "can be most readily and fairly determined by as- [459] certaining the value of the entire tract of land, excluding the enhancement resulting from the contemplated improvement; then,[2] what will be its value after the appropriation of a portion of such estate therein as may be proposed to be taken. The difference in value thus found is the true compensation to which the owner is entitled."[3] The particular facts and circumstances to be considered in adjusting the difference in the value of a tract of land before and after a portion of it has been taken or appropriated to public use cannot, from the nature of things, be set out in detail or defined with any degree of precision; but every circumstance injuriously affecting the citizen in the enjoyment of his land not taken, which can be satisfactorily demonstrated to grow out of his being deprived of the use theretofore enjoyed by him of the portion taken, should receive due consideration and be allowed its proper weight. The appraisers or jury should disregard reasons which are purely personal to the owner, not affecting the market value of his remaining lands, and also such prospective damages as may follow the construction and operation of the proposed railway or other public work. These prospective damages are to be considered in the determination of the consequential damages, and the rule laid down in the case of Sutton's heirs controls the settlement of that question. A survey is taken of all the advantages and disadvantages which may be reasonably anticipated to result from the prudent construction and operation of the proposed railway, and if the balance be against the owner of the land, then to the extent that such balance diminishes its market value he should have a judgment on account of incidental damages; otherwise, of course, he is entitled to nothing.[4]

In Mississippi and Virginia a trespasser's liability is not diminished by benefits on the subsequent institution of condemnation proceedings.[5] In New York, where no land is taken,

[1] Henderson, etc. R. Co. v. Dickerson, 17 B. Mon. 180, 66 Am. Dec. 148; Louisville, etc. R. Co. v. Barrett, 91 Ky. 487, 491, 16 S. W. Rep. 278. See West Virginia, etc. R. Co. v. Gibson, 94 Ky. 234, 21 S. W. Rep. 1055.

[2] Still excluding this enhancement.

[3] Elizabethtown, etc. R. Co. v. Helm's Heirs, 8 Bush, 681.

[4] Id.

[5] Louisville, etc. R. Co. v. Hopson, 73 Miss. 773, 19 So. Rep. 718; Rich-

but only an easement of nominal value, and the action is in equity by the owner or lessee of city lots abutting on a street to recover past damages for the trespass committed and also damages for the permanent injury, benefits may be deducted, though they affect several pieces of property in the same vicinity; in fact, all benefits, whether special or general, occasioned by the construction and operation of the road, which directly enhance the rental value of the property, are to be considered.[1]

§ 1088. What lands considered in assessing benefits and damages. The owner's lands taken into consideration [460] in the estimate of damages and benefits are those adjoining and connected with the land taken and forming a part [461] of the same parcel.[2] The fact that the property consists of several lots, blocks, or legal subdivisions of sections, as sold by the government, will not prevent its being considered as one tract or parcel if it is occupied and used as such.[3] Nor will land so occupied be deemed separated by a highway, street or alley

mond & M. R. Co. v. Humphreys, 90 Va. 425, 18 S. E. Rep. 901.

[1] Newman v. Metropolitan E. R. Co., 118 N. Y. 618, 23 N. E. Rep. 901, 7 L. R. A. 289; Bohn v. Same, 129 N. Y. 576, 29 N. E. Rep. 802, 14 L. R. A. 344; Sutro v. Manhattan R. Co., 137 N. Y. 592, 33 N. E. Rep. 334.

[2] Hilbourne v. Suffolk, 120 Mass. 393, 21 Am. Rep. 522; Mix v. La Fayette, etc. R. Co., 67 Ill. 319; St. Louis, etc. R. Co. v. Brown, 58 Ill. 61; Todd v. Kankakee, etc. R. Co., 78 Ill. 530; Meacham v. Fitchburg R. Co., 4 Cush. 291; White v. Fifth Avenue & High Street Bridge Co., 189 Pa. 500, 42 Atl. Rep. 136.

[3] Stevens v. New York E. R. Co., 130 N. Y. 95, 28 N. E. Rep. 667; Driver v. Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 775; Welch v. Milwaukee, etc. R. Co., 27 Wis. 108; Ham v. Wisconsin, etc. R. Co., 61 Iowa, 716, 17 N. W. Rep. 157; Cummins v. Des Moines, etc. R. Co., 63 Iowa, 397, 19 N. W. Rep. 268; Cox v. Mason City, etc. R. Co., 77 Iowa, 20, 41 N. W. Rep. 475; Dudley v. Minnesota & N. R. Co., 77 Iowa, 408, 42 N. W. Rep. 359; Reisner v. Union Depot R. Co., 27 Kan. 382; Wilmes v. Minneapolis & N. R. Co., 29 Minn. 242, 13 N. W. Rep. 39; Springfield & S. R. Co. v. Calkins, 90 Mo. 538, 3 S. W. Rep. 82; Union Elevator Co. v. Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. Rep. 1071; Kansas City Suburban Belt R. Co. v. Norcross, 137 Mo. 415, 38 S. W. Rep. 299; A. & N. R. Co. v. Boerner, 34 Neb. 240, 51 N. W. Rep. 842, 33 Am. St. 637; Omaha Southern R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289; Orth v. Milwaukee, 92 Wis. 230, 65 N. W. Rep. 1029.

Where fourteen lots were occupied as an entirety, ten of them being owned by the occupant and the others held by him under a lease, the damages resulting from taking a portion of the leased lots were measured by the decrease in the market value of the whole tract during the time the lease was to run. Chicago & E. R. Co. v. Dresel, 110 Ill. 89.

running through it,[1] or by county lines, although that condemned is wholly in one county;[2] or because it formerly had been divided into two farms owned by different parties, from whom the present owner derived title.[3] If two properties, having no physical connection, are so inseparably connected in the use for which they are applied as that the injury and destruction of one must necessarily and permanently injure the other, they may be regarded as one for the purpose of assessing damages.[4] If the condemning party originally entered upon the land wrongfully, and before the institution of proceedings the owner has conveyed in fee to another a strip of land adjoining that occupied by the wrong-doer, he is, notwithstanding such conveyance, entitled to be compensated for the injury done to his tract as a whole.[5] But unless the property claimed to be one tract is so used and occupied, if it is separated by streets, it will be regarded as consisting of separate parcels as so divided.[6] If the action is by an abutting owner to recover damages for the construction of a viaduct it is proper to exclude testimony as to the effect of the improvement upon other lots in the same block if they are separated from that on account of which the action was brought by an alley and front on another street.[7] Where the plaintiff owned land which abutted on a street occupied by the defendant's railroad, and also owned another and larger tract separated from the first by the land of another, which second tract did not abut on the street, but was connected with the first and with the street by a private right of way over the intervening tract, damages could

[1] Id.; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; Page v. Chicago, etc. R. Co., 70 Ill. 324; Chapman v. Oshkosh R. Co., 33 Wis. 629; Sherwood v. St. Paul, etc. R. Co., 21 Minn. 127; St. Paul, etc. R. Co. v. Murphy, 19 Minn. 500; Kansas City, etc. R. Co. v. Merrill, 25 Kan. 421; Goodwine v. Evans, 134 Ind. 262, 33 N. E. Rep. 1031; Peck v. Bristol, 74 Conn. 483, 51 Atl. Rep. 521; Haggard v. Independent School District, 113 Iowa, 486, 85 N. W. Rep. 777.

[2] Atchison & N. R. Co. v. Gough, 29 Kan. 94.

[3] Frick Coke Co. v. Painter, 198 Pa. 468, 48 Atl. Rep. 302.

[4] Rudolph v. Pennsylvania Schuylkill Valley R. Co., 186 Pa. 541, 40 Atl. Rep. 1083, 47 L. R. A. 782.

[5] Graham v. Pittsburgh, etc. R. Co., 145 Pa. 504, 22 Atl. Rep. 983.

[6] In re New York Central R. Co., 6 Hun, 149; White v. Metropolitan West Side E. R. Co., 154 Ill. 620, 39 N. E. Rep. 270.

[7] Chicago v. Spoor, 190 Ill. 340, 60 N. E. Rep. 540; Evansville & R. R. Co. v. Charlton, 6 Ind. App. 56, 64, 33 N. E. Rep. 129; Lawrence v. Philadelphia, 154 Pa. 20, 25 Atl. Rep. 1079; Gibson v. Fifth Avenue & High Street Bridge Co., 192 Pa. 55, 43 Atl. Rep. 339, 73 Am. St. 795.

not be recovered on account of the second tract.[1] If city property, in fact unoccupied, is platted or divided into lots, nothing else being shown, it will be treated as lots intended for use as such, and not as an entire tract.[2] But in Illinois a land-owner is not barred of the right to compensation for land not taken because he has platted it, and it is divided from that taken by a line designated on the plat.[3] The mere plotting of building lots in anticipation of an opportunity to sell them does not sever them from the residue of the farm.[4] Where two tracts of land were separated by a cattle drive sixteen feet wide, over and under which the land-owner had a right of way, with full privilege to bridge over or tunnel under, the tracts were considered as one.[5] If the whole body of land is wild, diversified, and not used as an entirety the question as to how much of it shall be considered in assessing damages is for the jury, and it is proper to regard the cuts and fills which will be made in constructing the proposed railroad, and what effect it will have on farming operations.[6] Agricultural land may be separated so as not to be treated as an entirety by an intervening [462] bluff.[7] Damages to separate tracts are to be separately assessed;[8] though compensation may be made for the severance of one farm from another so far as damage results to their owner by reason of their being made so small that they cannot be as profitably worked as before.[9]

The questions which arise in this connection are so far influenced by the facts involved in them that the enunciation of a rule which will be applicable generally is impracticable. That announced by the Minnesota court is probably as good as any that has been formulated: "To constitute unity of property between two contiguous, but *prima facie* distinct, parcels of land, there must be such a connection or relation of adapta-

[1] Pennsylvania Co. for Insurance v. Pennsylvania Schuylkill Valley R. Co., 151 Pa. 334, 25 Atl. Rep. 107.

[2] Wilcox v. St. Paul, etc. R. Co., 35 Minn. 439, 29 N. W. Rep. 148.

[3] Metropolitan West Side E. R. Co. v. Johnson, 159 Ill. 434, 42 N. E. Rep. 871, 31 Am. St. 762.

[4] Bridgeman v. Hardwick, 67 Vt. 653, 31 Atl. Rep. 33.

[5] Union Terminal R. Co. v. Peet Brothers Manuf. Co., 58 Kan. 197, 48 Pac. Rep. 860.

[6] Ellsworth v. Chicago, etc. R. Co., 91 Iowa, 386, 59 N. W. Rep. 78.

[7] Minnesota R. Co. v. Doran, 15 Minn. 230.

[8] St. Louis, etc. R. Co. v. Brown, 58 Ill. 61; Potts v. Railroad Co., 119 Pa. 278, 13 Atl. Rep. 291, 4 Am. St. 646.

[9] Sharpe v. United States, 112 Fed. Rep. 893, 50 C. C. A. 597.

tion, convenience and actual and permanent use between them as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used."[1] It is observed in a late Massachusetts case that "whether a particular lot of land constitutes an independent parcel is a question which cannot be determined in the affirmative by the mere fact that it is separated from other land by a highway or street, or by paper lines, or by fences; nor can it be determined in the negative by the mere fact that it is all in one ownership and is not divided by streets or by paper lines. But when, as in the present case, the evidence shows that there is an actual division by streets wrought and in use for travel, and by recorded paper lines, and there is no evidence that any two of the lots are used together, or held for sale as one parcel, and the only use shown is a separate and distinct use and holding of each lot by itself, we think each lot is a separate and distinct parcel."[2]

If the land-owner answers and raises an issue as to the amount of damage resulting from the building of a railroad through the land described in the company's petition, and which is also described in the answer, in the absence of any claim made therein for injury to other land there cannot be a recovery for any depreciation in its value, though that undescribed was used with the other as a single farm tract.[3] If the owner of lands on the seashore has no property rights therein no recovery should be permitted for the loss of any that may thereafter accrue as the result of legislation, even if the condemning party would enjoy the benefit of the rights which might be granted. Such a contingency is too remote to be made the basis of judicial calculation.[4] The same objection defeats the claim of the owner of one legal subdivision of land which is cut off from another subdivision which he farms under a verbal lease, though he has a vested interest in the latter subject to a life estate.[5]

[1] Peck v. Superior, etc. R. Co., 36 Minn. 343, 31 N. W. Rep. 217.

[2] Wellington v. Boston & M. R., 164 Mass. 380, 41 N. E. Rep. 652.

[3] Northern Pacific, etc. R. Co. v. Coleman, 3 Wash. 228, 28 Pac. Rep. 514.

[4] Bellingham Bay, etc. R. Co. v. Strand, 4 Wash. 311, 30 Pac. Rep. 144.

[5] Conness v. Indiana, etc. R. Co., 193 Ill. 464, 62 N. E. Rep. 221.

§ 1089. Proof of value and damages. These are not susceptible of precise proof and can only be approximately shown by the opinions of witnesses having the requisite information. If the true value of an estate immediately before and immediately after the location of a road over it could be accurately ascertained such a discovery would afford the most exact means of determining the real pecuniary damage sustained by its owner. The market value is a near, and perhaps the closest, approximation to it; and, therefore, any evidence which is competent in its general character to prove that is apposite and admissible. In the very nature of things there can be no absolute standard by which the value of land or interests therein can be measured; and, of course, when it cannot be tested by the fact of a recent sale the nearest approach to it which can be obtained is a knowledge of the opinion and judgment of intelligent, practical men who are acquainted with the property. Evidence of such opinion and judgment must of necessity often be all that can be resorted to, and it is always competent and admissible, leaving its weight in each particular case to be determined by the jury in connection with the circumstances under which it is offered.[1]

Market value means the fair value of property as between one who wants to purchase and one who wants to sell; not what could be obtained for it under peculiar circumstances when a greater than its fair price could be realized, nor its speculative value; not a value received because of the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction. It is what it would bring at a fair public sale where one party wanted to sell and the other to buy.[2] The jury, in

[1] Alameda v. Cohen, 133 Cal. 5, 65 Pac. Rep. 127; Dwight v. Hampden, 11 Cush. 203; Wyman v. Lexington, etc. R. Co., 13 Met. 316; Reynolds v. Burlington, etc. R. Co., 106 Ill. 152; Pittsburgh, etc. R. Co. v. Robinson, 95 Pa. 426; St. Louis, etc. R. v. Anderson, 39 Ark. 167; Leroy & N. R. Co. v. Hawk, 39 Kan. 638, 18 Pac. Rep. 943, 7 Am. St. 566; Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. Rep. 224; Metropolitan West Side E. R. Co. v. Dickinson, 161 Ill. 22, 43 N. E. Rep. 706; St. Louis, etc. R. Co. v. St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. Rep. 399; Hewitt v. Pittsburg, etc. R. Co., 19 Pa. Super. Ct. 304.

[2] Lawrence v. Boston, 119 Mass. 126; Little Rock Junction R. v. Woodruff, 49 Ark. 381, 5 S. W. Rep. 792, 4 Am. St. 51; Cohen v. St. Louis,

making an estimate upon the testimony of the opinions of wit- [463] nesses, should not adopt those of men who are sanguine in their estimate of value, nor of those who are overcautious; but of prudent, practical men, men of experience, thought and consideration, who have had opportunity of forming correct opinions of the value of the lands and the damages sustained.[1] Testimony as to whether the land in question is in demand or not may be received;[2] but not as to what the land in question would yield in crops.[3]

The market value of land is not a question of science or skill upon which only an expert can give an opinion. Persons in the neighborhood are presumed to have sufficient knowledge of its value.[4] The opinions of witnesses founded upon a knowledge of the location, productiveness or adaptation of the land to other uses, not speculative, or of the market or selling price of similar land in the vicinity are legal evidence to prove its

etc. R. Co., 34 Kan. 158, 8 Pac. Rep. 138, 36 Am. Rep. 5; Moulton v. Newburyport Water Co., 137 Mass. 163; Sullivan v. Lafayette County, 61 Miss. 271; Brown v. Calumet River R. Co., 125 Ill. 600, 18 N. E. Rep. 283; Kiernan v. Chicago, etc. R. Co., 123 Ill. 188, 14 N. E. Rep. 18; Calumet River R. Co. v. Moore, 124 Ill. 329, 15 N. E. Rep. 764; Richardson v. Board of Levee Com'rs, 68 Miss. 539, 9 So. Rep. 351; Board of Levee Com'rs v. Hendricks, 77 Miss. 488, 27 So. Rep. 613.

Evidence of the amount of business done on property and of the profits arising therefrom is too speculative and uncertain. De Boul v. Freeport, etc. R. Co., 111 Ill. 499. And evidence of the cost of buildings upon property is not an element of damages unless it is shown that they increase its value to the extent of their cost. Jacksonville & S. R. Co. v. Walsh, 106 Ill. 253.

[1] Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 503.

[2] St. Louis, etc. R. Co. v. St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. Rep. 399.

[3] Board of Levee Com'rs v. Hendricks, *supra*.

[4] Shattuck v. Stoneham, etc. R. Co., 6 Allen, 115; Swan v. Middlesex, 101 Mass. 173; Pennsylvania, etc. R. Co. v. Bunnell, 81 Pa. 414; Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. Rep. 641; San Diego Land & T. Co. v. Neale, 78 Cal. 63, 78, 20 Pac. Rep. 372; Leroy & W. R. Co. v. Hawk, 39 Kan. 638, 18 Pac. Rep. 943; Springfield & S. R. Co. v. Calkins, 90 Mo. 538, 3 S. W. Rep. 82; Johnson v. Freeport, etc. R. Co., 111 Ill. 413; Union Elevator Co. v. Kansas City Suburban Belt R. Co., 135 Mo. 353, 375, 36 S. W. Rep. 1071; Kansas City Suburban Belt R. Co. v. Norcross, 137 Mo. 415, 38 S. W. Rep. 299; Kansas City, etc. R. Co. v. Dawley, 50 Mo. App. 480, 488. As to the admissibility of expert testimony in New York elevated railroad cases, see Roberts v. New York E. R. Co., 128 N. Y. 455, 28 N. E. Rep. 486; Doyle v. Manhattan R. Co., 128 N. Y. 488, 28 N. E. Rep. 495; Gallagher v. Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250, affirmed without opinion, 164 N. Y. 602.

value.[1] But while such opinions are competent, it has been generally held that witnesses cannot, upon direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for such lands of like quality and location, or for the land in question or any part thereof; or how much the company have been compelled to pay in other and like cases — notwithstanding those transactions may constitute the source of their knowledge. If this was allowed the other side would have the right to controvert each transaction instanced by the witnesses and investigate its merits, which would lead to as many side issues as transactions and render the investigation interminable. Upon cross-examination, however, the knowledge of witnesses, and, therefore, the value of their opinions, may be tested in that mode if desired by the party in whose interest the examination is conducted.[2] In some states evidence of *bona fide* offers to sell or purchase the land in question is admissible.[3]

[1] Snyder v. Western Union R. Co., 25 Wis. 60; Central Pacific R. Co. v. Pearson, 35 Cal. 261; Parks v. Wisconsin, etc. R. Co., 33 Wis. 413; Searle v. Lackawanna, etc. R. Co., 33 Pa. 57; Brown v. Corey, 43 id. 495; Hewitt v. Pittsburg, etc. R. Co., 19 Pa. Super. Ct. 304; Kay v. Glade Creek & R. R. Co., 47 W. Va. 467, 35 S. E. Rep. 973; Snow v. Boston, etc. R. Co., 65 Me. 230; Grand Rapids, etc. R. Co. v. Horn, 41 Ind. 479; East Pennsylvania R. Co. v. Hiester, 40 Pa. 53; Whitman v. Boston, etc. R. Co., 7 Allen, 313; Pennsylvania, etc. R. Co. v. Bunnell, 81 Pa. 414; Pittsburgh, etc. R. Co. v. Rose, 74 id. 362; Curtin v. Nittany Valley R. Co., 135 id. 20, 19 Atl. Rep. 740; Orr v. Carnegie Natural Gas Co., 2 Pa. Super. Ct. 401.

[2] Central Pacific R. Co. v. Pearson, 35 Cal. 261; Brunswick, etc. R. Co. v. McLaren, 47 Ga. 546; Dickenson v. Fitchburg, 13 Gray, 546; Tufts v. Charlestown, 4 Gray, 537; Pennsylvania, etc. R. Co. v. Bunnell, 81 Pa. 414; Pinkham v. Chelmsford, 109 Mass. 225; Davis v. Charles River Branch R. Co., 11 Cush. 506; West Newbury v. Chase, 5 Gray, 421; Whitman v. Boston R. Co., 7 Allen, 313; Swan v. Middlesex, 101 Mass. 173; Shattuck v. Stoneham R. Co., 6 Allen, 115; Fall River Works v. Fall River, 110 Mass. 428; Cobb v. Boston, 112 id. 181; Hewitt v. Pittsburg, etc. R. Co., *supra;* Lehmicke v. St. Paul, etc. R. Co., 19 Minn. 464; Stinson v. Chicago, etc. R. Co., 27 Minn. 284; Curtin v. Nittany Valley R. Co., 135 Pa. 20, 19 Atl. Rep. 740; Kerr v. South Park Com'rs, 117 U. S. 379, 6 Sup. Ct. Rep. 801; Lyon v. Hammond, etc. R. Co., 167 Ill. 527, 47 N. E. Rep. 775; Schuster v. Sanitary District, 177 Ill. 626, 52 N. E. Rep. 855; Springfield v. Schmook, 68 Mo. 394; Becker v. Philadelphia & R. Terminal R. Co., 177 Pa. 252, 35 L. R. A. 583, 35 Atl. Rep. 617; In re Thompson, 127 N. Y. 463, 28 N. E. Rep. 384, 14 L. R. A. 52. See Langdon v. Mayor, etc., 133 N. Y. 628, 39 N. E. Rep. 98.

[3] East Brandywine & W. R. Co. v. Ranck, 78 Pa. 454; Springfield v. Schmook, 68 Mo. 394; Muller v.

Such offers must be confined to a period near the time at which the value is to be ascertained.[1] In Wisconsin, Illinois, Iowa, Maryland, New Hampshire, New Jersey, Maine, Kentucky, Texas, Washington, Massachusetts and Missouri evidence of sales of similar lands in the vicinity, if made about or before the time of the taking, may be received in the discretion of the trial court.[2]

It is generally held that opinions of witnesses are not ad- [464] missible as to the amount of damages, nor as to the future effect of taking part of a tract of land for a public improvement.[3] In Massachusetts, Illinois, Arkansas, South Carolina, Pennsylvania, and, it seems, Minnesota, a different rule prevails.[4] In Missouri there is conflict on this point; but the latest

Southern Pacific Branch R. Co., 83 Cal. 240, 23 Pac. Rep. 265; Johnson v. Freeport, etc. R. Co., 111 Ill. 413; Springer v. Chicago, 135 id. 552, 26 N. E. Rep. 514, 12 L. R. A. 609. *Contra*, Sharpe v. United States, 112 Fed. Rep. 893, 50 C. C. A. 597.

It is said in Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. Rep. 224, that the general rule is that it is not competent for the owner to prove what he has been offered for his property (Central Pacific R. Co. v. Pearson, 35 Cal. 247), or what persons who have been looking for similar property were willing to give for it. Selma, etc. R. Co. v. Keith, 53 Ga. 178; Lewis on Eminent Domain, § 446. Muller v. R. Co., *supra*, it is intimated, was inadvertently decided in opposition to the general rule.

[1] Santa Ana v. Harlin, *supra*.

[2] Watson v. Milwaukee & M. R. Co., 57 Wis. 332, 350, 15 N. W. Rep. 468; Washburn v. Milwaukee, etc. R. Co., 59 Wis. 364, 377, 18 N. W. Rep. 328; Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415, 423; Concordia Cemetery Ass'n v. Minnesota & N. R. Co., 121 Ill. 199, 212, 12 N. E. Rep. 536; Chandler v. Jamaica Pond Aqueduct Co., 122 Mass. 305, and cases cited; St. Louis, etc. R. Co. v. Clark, 121 Mo. 169, 25 S. W. Rep. 192, 26 L. R. A. 751; In the Matter of Forsyth Boulevard, 127 Mo. 417, 30 S. W. Rep. 188; Mayor v. Smith & S. Brick Co., 80 Md. 458, 31 Atl. Rep. 422; Concord R. v. Greely, 27 N. H. 237; Laing v. United Jersey R. & C. Co., 54 N. J. L. 576, 25 Atl. Rep. 409, 33 Am. St. 682; Norton v. Willis, 75 Me. 80; Paducah v. Allen, — Ky. —, 63 S. W. Rep. 981; Sullivan v. Missouri, etc. R. Co., — Tex. Civ. App. —, 68 S. W. Rep. 745, citing the text; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. Rep. 738; Cherokee v. S. C. & I. F. Town Lot & Land Co., 52 Iowa, 279, 3 N. W. Rep. 42;

[3] Atlantic, etc. R. Co. v. Campbell, 4 Ohio St. 583, 64 Am. Dec. 607; Rockford, etc. R. Co. v. McKinley, 64 Ill. 338; Covill v. St. Paul, etc. R. Co., 19 Minn. 283; Curtis v. Same, 20 Minn. 28; Dalzell v. Davenport, 12 Iowa, 437; Tingley v. Providence, etc. R. Co., 8 R. I. 493; Hagaman v. Moore, 84 Ind. 496; Leroy & W. R. Co. v. Ross, 40 Kan. 598, 20 Pac. Rep. 197 (correcting former intimations to the contrary); Omaha v. Kramer, 25 Neb. 489, 41 N. W. Rep. 295, 13 Am. St. 504; Sixth Avenue R. Co. v. Metropolitan E. R. Co., 138 N. Y. 548, 34 N. E. Rep 400.

[4] Swan v. Middlesex, 101 Mass. 173; Brainard v. Boston, etc. R. Co., 12

case that has come to notice says that the better rule is that the witnesses should state only facts, and leave to the jury the question as to the amount of damages. But a judgment will not be reversed solely because testimony was received as to the amount of the damages.[1] An exception to the rule that opinions as to the amount of damage are not admissible is made where the subject of the injury is so indefinite and general in its nature as not to be susceptible of direct proof. In such a case if the witness has personally observed the facts and circumstances upon which he bases his conclusions he may give his opinion.[2]

The price paid for property does not furnish a basis for estimating its value.[3] In Pennsylvania the price demanded by the owner of land as compensation for the damage which might be done may be proved, no element of compromise entering into the demand.[4] A memorandum made by the owner of land and used by him to secure an abatement of the taxes thereon is admissible on the question of the value of the land; and so is evidence of an attempted sale of it, the attempt being made just after the taking, but without knowledge of it, the owner being permitted to give his reasons for making it.[5] In determining the value of corporate stock the returns made by the officers under oath to the public authorities for a series of years are admissible.[6] If the property is without market value it may be compared with other property, and its value

Gray, 407; Springfield & M. R. v. Rhea, 44 Ark. 285; Little Rock Junction R. v. Woodruff, 49 id. 381, 5 S. W. Rep. 792, 4 Am. St. 51; Springfield & S. R. Co. v. Calkins, 90 Mo. 538, 3 S. W. Rep. 82; Bowen v. Atlantic, etc. R. Co., 17 S. C. 574; Keithsburg, etc. R. Co. v. Henry, 79 Ill. 290; Beck v. Pennsylvania, etc. R. Co., 148 Pa. 271, 33 Am. St. 822, 23 Atl. Rep. 900; Lehmicke v. St. Paul, etc. R. Co., 19 Minn. 464, 481; Sewell v. Chicago Terminal Transfer R. Co., 177 Ill. 93, 52 N. E. Rep. 302. See § 444.

[1] Union Elevator Co. v. Kansas City Suburban Belt R. Co., 135 Mo. 353, 375, 36 S. W. Rep. 1071. See Spencer v. Metropolitan Street R. Co., 120 Mo. 154, 23 S. W. Rep. 126, 22 L. R. A. 668.

[2] Taylor v. Jackson, 83 Mo. App. 641.

[3] Chicago, etc. R. Co. v. Griffith, 44 Neb. 690, 697, 62 N. W Rep. 868; Lanquist v. Chicago, 200 Ill. 69, 65 N. E. Rep. 681.

[4] Orr v. Carnegie Natural Gas Co., 2 Pa. Super. Ct. 401.

[5] Manning v. Lowell, 173 Mass. 100, 53 N. E. Rep. 160.

[6] Chambersburg & B. Turnpike Road, 20 Pa. Super. Ct. 173, 181; Mifflin Bridge Co. v. Juniata County, 144 Pa. 375, 22 Atl. Rep. 896, 13 L. R. A. 431.

may be shown by persons who have knowledge thereof.[1] If the jury view the premises they may award damages according to their judgment and in disregard of the testimony given in court.[2] The recognized standard mortality tables, together with computations by experts based upon them, are competent, in connection with other evidence, to show the present value of a life estate for the purpose of estimating damages to a remainder-man from the change of grade of a street, regardless of whether the issue is being tried before a jury or in equity.[3]

§ 1090. Effect of judgment for compensation — Abandonment of proceedings. Such a judgment is a bar only to an action for such injuries as could properly be included in the assessment.[4] These are damages resulting from making the appropriation in conformity to law and proceeding with the construction of the public improvement and subsequent use of the property in a skilful and proper manner, observing all legal restrictions and fulfilling all legal obligations.[5] Just compensation does not extend to or embrace injuries to adjoining land not authorized to be taken, nor to damages resulting from carelessness or wilful trespass in the execution of the [465] work.[6] It is conclusively presumed after judgment that

[1] St. Louis, etc. R. Co. v. Chapman, 38 Kan. 307, 16 Pac. Rep. 695, 5 Am. St. 744; Kansas City, etc. R. Co. v. Dawley, 50 Mo. App. 480, 488.

[2] Guyer v. Davenport, etc. R. Co., 196 Ill. 370, 63 N. E. Rep. 732.

[3] Joliet v. Blower, 155 Ill. 414, 40 N. E. Rep. 619.

[4] Southside R. Co. v. Daniel, 20 Gratt. 344.

[5] § 1068; Dodge v. County Com'rs, 3 Met. 380; Delaware Canal Co. v. Lee, 22 N. J. L. 243; McCormick v. Kansas City, etc. R. Co., 57 Mo. 433; Bailey v. Mayor, 3 Hill, 531; Lawrence v. Great Northern R. Co., 16 Q. B. 643; Mason v. Kennebec, etc. R. Co., 31 Me. 215; Chicago, etc. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. Rep. 460; Same v. McAuley, 121 Ill. 160, 11 N. E. Rep. 67; Peck v. Bristol, 74 Conn. 483, 51 Atl. Rep. 521; Port v. Huntingdon, etc. R. Co., 168 Pa. 19, 31 Atl. Rep. 950; Reisner v. Union Depot & R. Co., 27 Kan. 382; Leavenworth, etc. R. Co. v. Usher, 42 id. 637, 22 Pac. Rep. 734; Kansas City, etc. R. Co. v. Lackey, 72 Miss. 881, 16 So. Rep. 909, 48 Am. St. 589; Yazoo, etc. R. Co. v. Davis, 73 Miss. 678, 32 L. R. A. 262, 19 So. Rep. 487, 55 Am. St. 562; Fremont, etc. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. Rep. 263, 61 Am. St. 578, 36 L. R. A. 417; Norfolk & W. R. Co. v. Carter, 91 Va. 587, 22 S. E. Rep. 517; Mullen v. Lake Drummond Canal & W. Co., 130 N. C. 496, 41 S. E. Rep. 1027.

[6] Colcough v. Nashville, etc. R. Co., 2 Head, 171; L., St. L. & T. R. Co. v. Barrett, 13 Ky. L. Rep. 232, 16 S. W. Rep. 278; Kehoe v. Philadelphia, 199 Pa. 45, 48 Atl. 679; Sanitary District v. Ray, 64 N. E. Rep. 1048, 199 Ill. 63.

it embraced all damages and benefits of every kind naturally consequent to the taking; in judgment of law all such were foreseen and compensated for or allowed,[1] and no others. But this does not preclude a fresh demand if the plan of the public work is changed after the assessment so as to make the effect of the appropriation more injurious,[2] or if the property taken is applied to a different use.[3] The judgment is conclusive of the amount due to the person designated to receive it,[4] and vests a right to the money.[5] After damages have been ascertained and fixed for taking private property for a highway there can be no abatement of the amount for subsequently vacating a part of such highway,[6] or for entirely discontinuing it.[7]

[1] Furniss v. Hudson River R. Co., 5 Sandf. 551; Chicago, etc. R. Co. v. Springfield, etc. R. Co., 67 Ill. 142; Pusey v. Allegheny, 98 Pa. 522; Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. Rep. 529, 36 Am. St. 359; Chicago, etc. R. Co. v. Brinkman, 47 Ill. App. 287; Fitzgerald v. Chicago, etc. R. Co., 48 Kan. 537, 29 Pac. Rep. 703; Atchison & N. R. Co. v. Forney, 35 Neb. 607, 53 N. W. Rep. 585, 37 Am. St. 450; Chicago, etc. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. Rep. 326; Opening of Second Avenue, 7 Pa. Super. Ct. 55; Welles v. Northern Central R. Co., 150 Pa. 620, 25 Atl. Rep. 51; Shoemaker v. United States, 147 U. S. 282, 327, 13 Sup. Ct. Rep. 361; Reid v. Hanover Branch R., 105 Mass. 303; Guyer v. Davenport, etc. R. Co., 196 Ill. 370, 63 N. E. Rep. 732; Kidder v. Oxford, 116 Mass. 165; Hammersley v. New York, 56 N. Y. 533; Phillips v. South Park Commission, 119 Ill. 626, 10 N. E. Rep. 230.

[2] American Telephone & Tel. Co. v. Pearce, 71 Md. 535, 18 Atl. Rep. 910; Ragsdale v. Southern R. Co., 60 S. C. 381, 38 S. E. Rep. 609; Boyd v. Negley, 53 Pa. 387; Bullard v. New York, etc. R. Co., 178 Mass. 570, 60 N. E. Rep. 380; Carpenter v. Easton R. Co., 26 N. J. L. 168; Wabash, etc. R. Co. v. McDougall, 118 Ill. 229, 8 N. E. Rep. 678, 126 Ill. 111, 18 N. E. Rep. 291, 9 Am. St. 539; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. Rep. 1022; Chicago, etc. R. Co. v. Cogswell, 44 Ill. App. 388. See Chicago, etc. R. Co. v. Cogswell, 94 Ill. App. 127; Kotz v. Illinois Central R. Co., 188 Ill. 578, 59 N. E. Rep. 240.

[3] Foster v. Chicago, etc. R. Co., 10 Tex. Civ. App. 476, 31 S. W. Rep. 529, citing Muhle v. New York, etc. R. Co., 86 Tex. 459, 25 S. W. Rep. 607; Lyon v. McDonald, 78 Tex. 71, 14 S. W. Rep. 261, 9 L. R. A. 295; Spokane v. Colby, 16 Wash. 610, 48 Pac. Rep. 248.

[4] Sparhawk v. Walpole, 20 N. H. 317.

[5] People v. Supervisors, 4 Barb. 64; Furbish v. County Com'rs, 93 Me. 117, 44 Atl. Rep. 364; Hallock v. Franklin County, 2 Met. 559; Harrington v. County Com'rs, 22 Pick. 267, 33 Am. Dec. 741; Myers v. South Bethlehem, 149 Pa. 85, 24 Atl. Rep. 280; Opening of Second Avenue, 7 Pa. Super. Ct. 55.

[6] Reed v. Wall, 34 N. J. L. 275.

[7] Clough v. Unity, 18 N. H. 75.

A judgment in a proceeding to establish a highway which was rendered more than six years prior to the commencement of another proceeding, such judgment not having

In Maine it is said [1] that it is settled by the great weight of authority that after condemnation proceedings have been perfected and the damages for the land taken have been finally ascertained and adjudged, the owner thereby acquires a vested right to have and recover the damages awarded. The condemning party cannot evade the payment of damages by revoking the proceedings or by surrendering the land without the consent and agreement of the land-owner. The English courts have maintained the doctrine, as well in public street improvements as in railway and other corporations, that where, by act of parliament, street commissioners or the managers of railway or other corporations are authorized to acquire title to land by appraisement, after giving notice to the owner to treat or submit to an appraisement, the mere giving the notice is an election to purchase at an appraisal; and that this election, being binding on the owner of the land, is also binding on the street commissioners or corporation.[2] The American cases generally favor the same doctrine.[3] In Illinois the judgment of condemnation is conditional and does not affect the title before payment is made.[4] There a municipality may abandon the improvement in aid of which it has obtained condemnation of property, and will be considered to have done so unless, within a reasonable time, it pays the award and takes possession of the property.[5] But it must act in good faith or the abandonment will not be effectual. Where proceedings have been begun by a municipality it cannot ignore the assessment of damages and judgment of condemnation and, by filing a new petition, obtain a re-assessment by another jury.[6]

been paid nor the highway opened, is not a proper basis for damages in the later proceeding. Decker v. Washburn, 8 Ind. App. 673, 35 N. E. Rep. 1111.

[1] Furbish v. County Com'rs, 93 Me. 117, 44 Atl. Rep. 364.

[2] King v. Com'rs of Manchester, 4 B. & A. 335; King v. Hungerford Market Co., 4 B. & A. 327; Stone v. Commercial R. Co., 4 Mylne & C. 122; Walker v. Eastern Counties R., 6 Hare, 594.

[3] Imbescheid v. Old Colony R. Co., 171 Mass. 209, 50 N. E. Rep. 609, and many local cases cited; People v. Gas Light Co., 78 N. Y. 56; Butler v. Sewer Com'rs, 39 N. J. L. 665; Matter of Water Com'rs, 31 N. J. L. 72.

[4] Chandler v. Morey, 195 Ill. 596, 63 N. E. Rep. 512; Rice v. Chicago, 57 Ill. App. 558.

[5] Chicago v. Barbain, 80 Ill. 482.

[6] Chicago, etc. R. Co. v. Chicago, 143 Ill. 641, 32 N. E. Rep. 178; Hupert v. Anderson, 35 Iowa, 578; St. Joseph v. Hamilton, 43 Mo. 282; Rogers v. St. Charles, 3 Mo. App. 41; Leopold

Where condemnation proceedings are dismissed before a final award is made, if there has been an entry on the land affected, on the abandonment of the proceedings the entry will be regarded as tortious from the beginning, and if the delay has been long and is unexplained, a *prima facie* case is made for the plaintiff.[1] He is entitled to recover all his costs, including counsel fees incurred in contesting the condemnation proceedings.[2] Where they have been dismissed the same liability has been imposed.[3] But such liability is denied in New Jersey, the case being considered a clear one of *damnum absque injuria*.[4]

§ 1091. Interest. It being an accepted principle that land taken for public use should be valued and damages ascertained as of the date of the taking, payment is then legally due unless a statute designates some other time;[5] and on general principles interest should be given from the time when the principal should be paid,[6] or, in other words, from the time the land-owner was entitled to compensation,[7] unless the obliga-

v. Chicago, 150 Ill. 568, 37 N. E. Rep. 892; Pearce v. Chicago, 169 Ill. 631, 48 N. E. Rep. 330.

[1] Simpson v. Kansas City, 111 Mo. 237, 20 S. W. Rep. 38.

[2] St. Louis R. Co. v. Southern R. Co., 138 Mo. 591, 39 S. W. Rep. 471; Matter of Waverly Water Works Co., 85 N. Y. 478; Toledo v. Jacobson, 11 Ohio Ct. Ct. 220.

[3] Owen v. Springfield, 83 Mo. App. 557.

[4] Andrus v. Bay Creek R. Co., 60 N. J. L. 10, 36 Atl. Rep. 826. See § 3.

[5] Hamersley v. New York, 56 N. Y. 533; Phillips v. Pease, 39 Cal. 582; Cohen v. St. Louis, etc. R. Co., 34 Kan. 158, 168, 8 Pac. Rep. 138, 55 Am. Rep. 242; Drury v. Midland R., 127 Mass. 571, 585.

[6] Norris v. Philadelphia, 70 Pa. 332; Getz v. Philadelphia, & R. R. Co., 105 id. 547; Pennsylvania, etc. R. Co. v. Ziemer, 124 id. 560, 17 Atl. Rep. 187; Reed v. Chicago, etc. R. Co., 25 Fed. Rep. 886.

[7] Delaware, etc. R. Co. v. Burson, 61 Pa. 369; Alloway v. Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 8 L. R. A. 123; Miller v. St. Louis, etc. R. Co., 162 Mo. 424, 63 S. W. Rep. 85; Lough v. Minneapolis, etc. R. Co., 116 Iowa, 31, 89 N. W. Rep. 77; East Tennessee, etc. R. Co. v. Burnett's Ex'rs, 11 Lea, 525; Cincinnati v. Whetstone, 47 Ohio St. 196, 24 N. E. Rep. 409, quoting the three preceding propositions of the text; New Haven Steam Saw Mill Co. v. New Haven, 72 Conn. 276, 44 Atl. Rep. 229, 609; Imbescheid v. Old Colony R. Co., 171 Mass. 209, 50 N. E. Rep. 609; Weide v. St. Paul, 62 Minn. 67, 64 N. W. Rep. 65; Martin v. St. Louis, 139 Mo. 246, 41 S. W. Rep. 231; In re Belfast Water Commissioners, 15 L. R. Ire. 13; Stolze v. Milwaukee, etc. R. Co., 113 Wis. 44, 88 N. W. Rep. 919. See Matter of Trustees of New York & Brooklyn Bridge, 137 N. Y. 95, 32 N. E. Rep. 1054; People v. Coler, 60 App. Div. 77, 69 N. Y. Supp. 863.

In New Zealand interest on the sum awarded by a compensation

tion to pay it then is qualified by some required preliminary act to liquidate the amount or a demand of payment.[1] In [466] some states the taking is by legal proceedings to condemn; and there, as a general rule, interest is charged only from the date of award.[2] It is given, not strictly as damages, but in the discretion of the jury,[3] as an equitable mode of compensating the owner for the unnecessary delay in ultimately ascertaining the amount he is entitled to be paid when the final judgment is postponed for any re-examination by appeal or otherwise.[4] The general rule, therefore, is liable to be controlled by the circumstances of the particular case. If the owner has had the profitable use of the premises or received rents during such intermediate period these circumstances are taken into account and the interest abated accordingly. Advantage should be taken of such facts on the trial finally had.[5]

court under the public works act is not to be computed from a time anterior to that at which the award acquires the effect of a judgment of the supreme court. Walker v. Wellington & M. R. Co., 5 N. Z. L. R. (Sup. Ct.) 193. The rule in England is probably to the contrary. See § 1090.

[1] People v. Canal Com'rs, 5 Denio, 401.

In Clough v. Unity, 18 N. H. 75, it was considered that by the adjudication of damages on laying out a highway a right to the money is vested, and is not affected by a subsequent discontinuance of the highway. But after such adjudication no duty is imposed on the town except to pay before making the road. If the owner sues for the money before the town proceeds to open the highway, he does so before there is any active duty to pay.

[2] Metler v. Easton, etc. R. Co., 37 N. J. L. 222; Warren v. First Division, etc. R. Co., 21 Minn. 424.

In New Jersey interest is computed from the entry of judgment, and not from the rendition of verdict. National Docks, etc. R. Co. v. Pennsylvania R., 54 N. J. Eq. 142, 33 Atl. Rep. 860.

In Pennsylvania the date of the location of a railroad, and not the date of the bond, is the time from which interest is to be computed. Gilmore v. Pittsburg, etc. R. Co., 104 Pa. 275; Myers v. Schuylkill River East Side R. Co., 19 Phila. 468.

[3] Provident Life & T. Co. v. Philadelphia, 202 Pa. 78, 51 Atl. Rep. 597; Hewitt v. Pittsburg, etc. R. Co., 19 Pa. Super. Ct. 304.

[4] Klages v. Philadelphia & R. Terminal Co., 160 Pa. 386, 28 Atl. Rep. 862; Becker v. Same, 177 Pa. 252, 35 Atl. Rep. 617, 35 L. R. A. 583.

[5] Metler v. Easton, etc. R. Co., 37 N. J. L. 222; Warren v. First Division, etc. R. Co., 21 Minn. 424; West v. Milwaukee, etc. R. Co., 56 Wis. 318, 14 N. W. Rep. 292; Miller v. Asheville, 112 N. C. 759, 16 S. E. Rep. 762; Shoemaker v. United States, 147 U. S. 282, 321, 13 Sup. Ct. Rep. 361.

But in Commonwealth v. Boston, etc. R. Co., 3 Cush. 57, the court, by Shaw, C. J., said: "We consider it the plain dictate of justice when money is due on a judgment, or on a verdict in the nature of a judgment,

In Massachusetts because the statute makes no provision that interest shall be reduced by the owner's occupation of the premises after the taking his right to interest from the time of the taking until verdict is not affected by his occupation. The claim based thereon or upon any injury done the premises must be settled in some other proceeding.[1] In Missouri the interest cannot be offset by rents received by the land-owner after the taking unless their receipt is pleaded.[2] If such delay after the assessment by commissioners is by the unneces- [467] sary act or litigious conduct of the owner he will not be entitled to interest during its continuance.[3] Thus, if he is the sole appellant and the verdict should not be in excess of the appraisement of the commissioners, interest should be disallowed. In that event the postponement of the receipt of compensation adjudged by the commissioners and decided by the judge to have been adequate would be due to his own act. To allow him indemnity for such delay in the form of interest would be unreasonable and unjust.[4] But if the condemning party also appeal interest will not be denied to the owner because he appealed.[5] In New Hampshire, where the amount of damages has deen fixed by award of commissioners and the owner appeals, interest will be allowed unless the money has been tendered or deposited.[6] Then if he appeals and gets a larger sum allowed he is entitled to interest only on such additional sum, for he could receive the tendered or deposited sum without prejudice to his right to appeal.[7] Upon an appeal in a highway proceeding the plaintiff is entitled to interest from the time of filing the report of the referee until judg-

and payment is prevented by the necessary time taken for re examining the case, if it result in confirming the former judgment and showing that the party was then entitled to his money, that interest should be allowed as a just compensation for the delay." See Detmold v. Drake, 46 N. Y. 318.

[1] Imbescheid v. Old Colony R. Co., 171 Mass. 209, 50 N. E. Rep. 609; Pegler v. Hyde Park, 176 Mass. 101, 57 N. E. Rep. 327; Hay v. Commonwealth, — Mass. —, 67 N. E. Rep. 334.

[2] Ragan v. Kansas City & S. R. Co., 144 Mo. 623, 46 S. W. Rep. 602.

[3] Cook v. South Park Com'rs, 61 Ill. 115.

[4] Reisner v. Union Depot & R. Co., 27 Kan. 382.

[5] Warren v. First Division, etc. R. Co., 21 Minn. 424.

[6] Concord R. v. Greeley, 23 N. H. 237.

[7] Shattuck v. Wilton R. Co., 23 N. H. 269; Wichita & W. R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. Rep. 75.

ment is rendered thereon. If the land was in fact taken before the report was filed it is presumed that it included interest up to the time it was filed.[1] In Tennessee a tender of the amount originally awarded does not affect the plaintiff's right to interest on the whole sum finally assessed in his favor if the latter is larger than the former.[2] And in Nebraska a deposit made with an officer who holds the amount until the parties' rights are finally determined does not affect the land-owner's right to interest on the entire sum when the award is increased on his appeal;[3] but if the deposit is withdrawn by him pending an appeal and the final award is less than the sum of the deposit, the condemning party is entitled to interest on the difference between the two amounts.[4] In Illinois the right to interest, after judgment of condemnation, rests upon the statute which makes all judgments carry interest from their date. The costs incurred by the land-owner are a part of his judgment.[5] In another case the right to interest is held to accrue at the time actual possession of the property was taken.[6] Under a statute which requires nothing more than the payment of compensation within thirty days after final judgment, all other conditions are excluded.[7] If the money awarded has been paid into court for the benefit of the party entitled to it he can only recover such interest as it earned while in the custody of the court.[8] Under such circumstances interest cannot be recovered pending the determination of exceptions to the report of the commissioner.[9] The right to interest earned by such money is not lost by the land-owner's denial of the right to condemn and his refusal to accept the deposit.[10] If the payment of the award into court is

[1] Wentworth v. Portsmouth, 68 N. H. 392, 44 Atl. Rep. 531; Bridgeman v. Hardwick, 67 Vt. 653, 31 Atl. Rep. 33.

[2] Alloway v. Nashville, 88 Tenn. 510, 530, 13 S. W. Rep. 123, 8 L. R. A. 123.

[3] Sioux City, etc. R. Co. v. Brown, 13 Neb. 317, 14 N. W. Rep. 407; Chicago, etc. R. Co. v. Buel, 56 Neb. 205, 76 N. W. Rep. 571.

[4] Watson v. Milwaukee & M. R. Co., 57 Wis. 332, 348, 15 N. W. Rep. 468.

[5] Epling v. Dickson, 170 Ill. 329, 48 N. E. Rep. 1001.

[6] Evanston v. Clark, 77 Ill. App. 234, citing Chicago v. Palmer, 93 Ill. 125.

[7] St. Louis, etc. R. Co. v. Clark, 121 Mo. 169, 187, 25 S. W. Rep. 192, 26 L. R. A. 751; Same v. Fowler, 142 Mo. 670, 44 S. W. Rep. 771.

[8] Chicago, etc. R. Co. v. Eubanks, 130 Mo. 270, 32 S. W. Rep. 658.

[9] San Francisco, etc. R. Co. v. Leviston, 134 Cal. 412, 66 Pac. Rep. 473.

[10] Snyder v. Cowan, 50 Mo. App. 430.

made by statute a legal payment the refusal to accept it stops the running of interest.[1]

In states where the taking is the actual appropriation interest is allowed from that time and included in the award,[2] which bears interest after it is made.[3] Where the condemning party is required to procure condemnation of and pay for the property prior to actual appropriation or use of it, he is in fault and a trespasser if he takes possession without first acquiring the right. By such delay in instituting proceedings he incurs the hazard of paying an enhanced price as of the date of the assessment, in states where the value and damages are fixed at that date, or interest from the time of taking [468] possession where that fact fixes the date of taking.[4] In case of appropriations of private property for public use by the state or some municipal division compensation is not unfrequently so provided for that the owner must be the actor to obtain it. Then he must take the necessary steps to entitle himself to the money and to impose the immediate duty to pay it, and until that is done there can be no such default in making payment as will give him a right to interest.[5] But if the appropriating party takes unauthorized possession before payment, and the value and damages are fixed at the date of such appropriation, a right to interest arises from such actual taking.[6]

[1] National Docks, etc. R. Co. v. Pennsylvania R., 54 N. J. Eq. 142, 33 Atl. Rep. 860; Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. Rep. 361; In re Belfast Water Com'rs, 15 L. R. Ire. 13.

[2] Gay v. Gardiner, 54 Me. 447, 92 Am. Dec. 555; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Kidder v. Oxford, 116 Mass. 165; Reed v. Hanover Branch R. Co., 105 Mass. 303; Whitman v. Boston, etc. R. Co., 7 Allen, 313; Atlantic, etc. R. Co. v. Koblentz, 21 Ohio St. 334.

Where a jury returned a verdict in which they assessed the damages at a certain sum "with interest thereon from the time when the said railroad company took possession of the land," it was held void for uncertainty. Connecticut River, etc. R. Co. v. Clapp, 1 Cush. 559.

[3] West v. Milwaukee, etc. R. Co., 56 Wis. 318, 14 N. W. Rep. 292.

[4] Webster v. Kansas City & S. R. Co., 116 Mo. 114 22, S. W. Rep. 474; Bellingham Bay, etc. R. Co. v. Strand, 14 Wash. 144, 44 Pac. Rep. 140.

[5] People v. Canal Com'rs, 5 Denio, 401; Norris v. Philadelphia, 70 Pa. 334; Philadelphia v. Dyer, 41 id. 469, 470; In re Second Street, Harrisburg, 66 id. 132.

[6] Delaware, etc. R. Co. v. Burson, 61 Pa. 369; Fiske v. Chesterfield, 14 N. H. 240; Hampton v. Kansas City, 74 Mo. App. 129.

A mortgagee is not entitled to interest beyond the day when the award became payable, if there was no refusal to pay.[1]

In Ontario, though there is no provision in the statute respecting it, interest may be allowed against a city which takes land from the date of the by-law authorizing the taking and entry. This is in analogy to the English rule and is on the basis that the case is that of vendor and purchaser.[2] But this rule does not govern where land is not taken, but is only "injuriously affected" by a municipal improvement. The damages in the latter case are unliquidated, and are not a debt until they have been assessed by the proper tribunal.[3]

The acceptance of a part of the sum awarded as partial payment, without prejudice to the right to recover the balance and interest, does not bar the right to the latter. If there is no special agreement to that effect the law makes the application so as to satisfy the interest and applies the balance on the principal.[4] In New York interest on the sum awarded is given as damages and can only be recovered with the principal; it does not constitute a debt capable of a distinct claim. Hence acceptance of the principal, without bringing an action, bars the recovery of interest.[5] But it is otherwise if the principal was received under protest, interest being demanded,[6] or if there is an agreement that the right to interest should not be prejudiced by the payment of the principal.[7]

[1] Carpenter v. New York, 51 App. Div. 584, 64 N. Y. Supp. 839.

[2] In re Macpherson and City of Toronto, 26 Ont. 558; In re Leak and City of Toronto, 26 Ont. App. 351.

[3] In re Leak and City of Toronto, *supra*, reversing 29 Ont. 685.

[4] Weide v. St. Paul, 62 Minn. 67, 64 N. W. Rep. 65; Baltimore Extension R. Co., [1895] 1 Irish, 169.

[5] Cutter v. Mayor, 92 N. Y. 166.

[6] Devlin v. Mayor, 131 N. Y. 123, 30 N. E. Rep. 45.

[7] Martin v. St. Louis, 139 Mo. 246, 255, 41 S. W. Rep. 231.

CHAPTER XXVII.

TRESPASS TO PERSONAL PROPERTY.

§ 1092. When damages may exceed compensation.
1093. Certainty of damages.
1094. Remedy more comprehensive than trover.
1095. Aggravations increase damages.
1096. Measure of damages for taking or destroying property.
1097. Same subject; quantity of interest.
1098. Same subject; market value.
1099. Same subject; non-marketable property.
1100–1102. Special and consequential damages.
1103. Expenses to recover, restore and protect property.
1104. Mitigation of damages.
1105. Application of property to owner's benefit.
1106, 1107. Damages against trespasser from the beginning.

§ 1092. When damages may exceed compensation. [469] The recovery for this wrong is limited to compensation, in the absence of aggravations for which punitory damages are allowable. Whether, by the proof adduced, there are such aggravations shown as will justify the jury in considering a claim for such damages is for the court to decide. If there is testimony tending to show and warranting a finding that the trespass was wanton or malicious the court will submit the question of the allowance of such damages and their amount to the jury.[1] When their allowance has been so submitted the amount which the jury may think proper to award will be accepted by the court unless it is so exorbitant as to indicate that they have been influenced by passion, prejudice or a per-

[1] Selden v. Cushman, 20 Cal. 56, 81 Am. Dec. 93; Ives v. Humphreys, 1 E. D. Smith, 196; Pacific Ins. Co. v Conard, Baldw. 138; Moore v. Schultz, 31 Md. 423; Rose v. Story, 1 Pa. 190 44 Am. Dec. 121; Wylie v. Smitherman, 8 Ired. 236; Morris v. Shew, 29 Kan. 661; Wellman v. Dickey, 78 Me. 29, 2 Atl. Rep. 133; Willis v. Miller, 29 Fed. Rep. 238; Ten Hopen v. Walker, 96 Mich. 236, 55 N. W. Rep. 657, 35 Am. St. 598; Matteson v. Munro, 80 Minn. 340, 83 N. W. Rep. 153; Chappell v. Ellis, 123 N. C. 259, 31 S. E. Rep. 709, 68 Am. St. 822; Farr v. Swigart, 13 Utah, 150, 44 Pac. Rep. 711; Vogel v. McAuliffe, 18 R. I. 791, 31 Atl. Rep. 1; Henson v. Taylor, 108 Ga. 567, 33 S. E. Rep. 911; Shores v. Brooks, 81 Ga. 468, 8 S. E. Rep. 429, 12 Am. St. 332; Deleshaw v. Edelen, 72 S. W. Rep. 413 (Tex. Ct. of Civ. App.).

verted judgment.[1] A corporation may recover exemplary damages for a malicious and oppressive trespass.[2]

Statutes which impose treble damages for trespasses receive the strictest construction. Hence the imposition of that measure of liability for carrying off, using or destroying any wood, timber, lumber, hay, grass or other personal property applies only to things *ejusdem generis* with those enumerated — such as are produced and grown upon land; a yoke of oxen is not included.[3] Such a statute is not to be extended to a person who has not actually committed the trespass complained of.[4]

§ 1093. Certainty of damages. Trespass is a wrong committed with force, actual or constructive; it is more or less aggressive; therefore, the damages necessary to complete compensation usually include reparation for pecuniary items capable of clear proof and precise computation, and may include reparation for other injuries equally deserving recompense, though they cannot be proved with certainty, nor estimated by any precise standard, and possibly by no money standard. The former must be proved in actions for trespass [**470**] as in any other action, and if, when they are compensated, the plaintiff has adequate redress for the wrong suffered, they constitute the basis of his entire recovery and are the measure of damages; in other words, where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured such rule should be applied in actions of tort as well as in those upon contract.[5] If such rule exists as to a part of the damages only, it is available and obligatory to that extent. And if the wrong produce other injury also, not capable of such certain proof and pecuniary estimate, it is not necessarily excluded from the consideration of the jury. If the general facts can be proved they will be submitted to the jury for a finding of compensation according to their best judgment.[6]

[1] Rogers v. Henry, 32 Wis. 327; Belknap v. Boston, etc. R. Co., 49 N. H. 358; McCarthy v. Niskern, 22 Minn. 90; McConnell v. Hampton, 12 Johns. 234. See Stilson v. Gibbs, 53 Mich. 280, 18 N. W. Rep. 815.

[2] International, etc. R. Co. v. Telephone & Tel. Co., 69 Tex. 277, 5 S. W. Rep. 517, 5 Am. St. 45.

[3] Berg v. Baldwin, 31 Minn. 541, 18 N. W. Rep. 821.

[4] Potulni v. Saunders, 37 Minn. 517, 35 N. W. Rep. 379.

[5] Allison v. Chandler, 11 Mich. 542; Warren v. Cole, 15 id. 265; Gilbert v. Kennedy, 22 id. 117.

[6] Id.; Ogden v. Lucas, 48 Ill. 492; Dennison v. Hyde, 6 Conn. 507.

But they must tend to establish a damage in legal contemplation; that is to say, a recoverable damage according to the elementary requisites which have been considered at large in another place; a damage which is the natural and proximate consequence of the trespass, and of a nature susceptible of appreciation upon practicable proof,— neither remote nor speculative. In this action, as in all others where no proof laying ground for exemplary damages is given, compensation to the plaintiff for his loss is the general rule.[1] The maxim *de minimis non curat lex* does not apply where there has been a positive and wrongful invasion of another's property. The right to recover the value of property of which the owner has been wrongfully deprived is never denied.[2]

§ 1094. Remedy more comprehensive than trover. In trespass the possessor of a chattel may recover in respect of the taking and its circumstances; not only for any actual loss or injury suffered therefrom, but also some damages, not necessarily nominal,[3] even if no real injury ensued from the taking, and the property is not removed nor the plaintiff's enjoyment materially interfered with. In this respect the action of trespass reaches an element of the wrong which would be waived in trover.[4] Where the taking was attended with injurious aggravations it was held that a plea which alleged an assignment in bankruptcy after the commencement of the suit by which the right to recover for the property taken [**471**] passed to the assignee, was not an answer to the whole action; that the plaintiff still had a right to recover in respect of the taking.[5] Where the taking diminishes the value by severing fixtures their value in place, rather than as chattels severed, may be recovered.[6] Where a plank sidewalk was wrongfully removed the owner was held entitled to recover not merely the value of the plank, but their value laid in the walk.[7] In

[1] Hopple v. Higbee, 23 N. J. L. 342.

[2] Wartman v. Swindell, 54 N. J. L. 589, 25 Atl. Rep. 356, 18 L. R. A. 44.

[3] Alabama State Land Co. v. Slaton, 120 Ala. 259, 24 So. Rep. 720. See § 1093.

[4] Hite v. Long, 6 Rand. 457, 18 Am. Dec. 719; Bayliss v. Fisher, 7 Bing. 153; Doss v. Doss, 14 Week. Rep. 590; Chamberlain v. Shaw, 18 Pick. 219.

[5] Brewer v. Dew, 11 M. & W. 625. See Gregory v. Cotterell, 1 El. & B. 360.

[6] Moore v. Drinkwater, 1 F. & F. 144; Thompson v. Pettitt, 10 Q. B. 101.

[7] Rogers v. Randall, 29 Mich. 41.

trover the plaintiff could recover only the value of fixtures as mere chattels.[1]

§ 1095. Aggravations increase damages. In this action the plaintiff is entitled to give evidence, for the purpose of enhancing damages, of the circumstances which accompanied and gave character to the wrong, and to show any inconvenience, insult or injury attending it or resulting therefrom.[2] Where the defendant, by artifice, obtained entrance into the plaintiff's dwelling-house and thence removed furniture, lately sold and delivered, because it had not been paid for, the court said the pecuniary loss to the plaintiff is not necessarily the rule of damages. The jury are to determine the extent of the injury and the equivalent damages in view of all the circumstances of injury, insult, invasion of the privacy and interference with the comfort of the plaintiff and his family.[3] In New Hampshire nothing but compensatory damages can be awarded in a civil action based on a tort. Where trespass was brought for beating and injuring a horse, the act being accompanied with malicious insults, substantial damages were sustained, though the animal was previously lame and of small value. The court said: "In some cases compensation for the actual material damage sustained will be full compensation. In other cases the material damage may be trivial, and the principal injury be to the wounded feelings from the insult, degradation and other aggravating circumstances attending the act. . . . The award, as we construe it, compensates the plaintiff for the damage he has sustained by the injury to his property, and for his mental damage by reason of the defendant's malice."[4] In that state there may be a recovery for mental suffering caused by the malicious attachment of exempt inanimate property.[5]

An emphatic declaration of the right to recover for mental suffering is given in a late Minnesota case. The body of the

[1] Clarke v. Halford, 2 C. & K. 540.

[2] Bracegirdle v. Orford, 2 M. & S. 77; Sniveley v. Fahnstock, 18 Md. 391; Brown v. Bridges, 70 Tex. 661, 8 S. W. Rep. 502; Mitchell v. Mitchell, 54 Minn. 301, 55 N. W. Rep. 1134; Vogel v. McAuliffe, 18 R. I. 791, 31 Atl. Rep. 1.

[3] Ives v. Humphreys, 1 E. D. Smith, 196.

[4] Kimball v. Holmes, 60 N. H. 163.

[5] Friel v. Plumer, 69 N. H. 498, 43 Atl. Rep. 618, 76 Am. St. 189.

plaintiff's deceased husband was unlawfully mutilated and dissected. It was ruled that the right to its possession for the purposes of preservation and burial, in the absence of any testamentary disposition of it, belonged to the wife and that the law will protect such right; for an infraction of it there may be a recovery for injury to the feelings directly and proximately resulting, although no pecuniary loss was sustained.[1] In an Illinois case, household furniture valued at $90 was wrongfully removed by a person who claimed authority to do so by virtue of a mortgage. In passing upon the case, a verdict for $900 having been returned in favor of the plaintiff, the appellate court, while admitting that it would have been better satisfied if the verdict had been less, remarked: The actual loss to a man temporarily absent from his home, who returns and finds his home stripped of every vestige of household goods, and his wife and little children cast out, without warrant of law, cannot be fairly said to consist in the mere market value of his goods taken away. It has been held that, in addition to the property of the plaintiff, he was entitled to compensation for any bodily or mental anguish or suffering, for injury to his pride and social position, and for the sense of shame and humiliation at having his family turned out of their homes.[2]

The circumstances attending a trespass are thus allowed to be proved with a view to compensation for general as well as special damages; and also to show the evil motive, if such there be, with a view to exemplary damages. Where the trespass is committed in a wanton, rude and aggravating manner, indicating malice or a desire to injure, "a jury," said Baldwin, J., in a charge afterwards approved by the federal court of last resort, "ought to be liberal in compensating the party injured for all he has lost in property, in expenses for the recovery of his rights, in feelings, or in reputation; and [472] even this may be extended by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard, for the jury may not only take into view what is due to the party complaining, but to the public, inflicting

[1] Larson v. Chase, 47 Minn. 307, 50 N. W. Rep. 238, 28 Am. St. 370, 14 L. R. A. 85.

[2] Richardson v. O'Brien, 44 Ill. App. 243, citing Moyer v. Gordon, 113 Ind. 282, 14 N. E. Rep. 476.

what are called in law speculative, exemplary or vindictive damages."[1] The defendant, in the wrongful act of taking goods, used language which wounded the owner's feelings; it was allowed to be proved, and considered as one of the circumstances accompanying and giving character to the trespass for the purpose of increasing the damages for the malice and insult.[2] Exemplary damages are not allowable in an action based on a trespass which, though unlawful, was not malicious; malice is not implied from the mere unlawfulness of the act.[3] But such damages may be imposed where a trespass is wantonly or recklessly committed, though there is no proof of actual malice toward the plaintiff,[4] and where it is accompanied by circumstances of aggravation,[5] or very gross and reprehensible negligence.[6] But in no case can they be recovered on anything less than gross negligence in the strictest definition of the term — "such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and indifferent or worse to the danger of injury to the persons or property of others."[7] A mere wrongful taking of property under circumstances showing a disregard of the rights of plaintiff does not warrant an award of exemplary damages.[8] But in Minnesota the making

[1] Pacific Ins. Co. v. Conard, Baldw. 138; Conard v. Pacific Ins. Co., 6 Pet. 262.

Johnson v. Camp, 51 Ill. 219, is to the effect that where a party takes away a crop, raised and harvested by another, stacked upon premises the taker had bought at a foreclosure sale, he is a trespasser, and is chargeable with a knowledge in law that he did not acquire the crop by his purchase, and is liable to punitory damages. Robinson v. Goings, 63 Miss. 500.

[2] Treat v. Barber, 7 Conn. 279; Bracegirdle v. Orford, 2 M. & S. 77; Edwards v. Beach, 3 Day, 44, 3 Am. Dec. 255; Nichols v. Bronson, 2 Day, 211; Linsley v. Bushnell, 15 Conn. 225, 38 Am. Dec. 79.

[3] Brown v. Allen, 35 Iowa, 306; Heidenheimer v. Sides, 67 Tex. 32, 2 S. W. Rep. 87; Mansur-Tebbetts Implement Co. v. Smith, 65 Ill. App. 319; Wormald v. Hill, 4 Ky. L. Rep. 723 (Ky. Super. Ct.).

[4] Devaughn v. Heath, 37 Ala. 595; Kemmitt v. Adamson, 44 Minn. 121, 46 N. W. Rep. 327; Ten Hopen v. Walker, 96 Mich. 236, 55 N. W. Rep. 657, 35 Am. St. 598; Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496.

[5] Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776; Frank v. Curtis, 58 Mo. App. 349; Milburn v. Beach, 14 Mo. 104, 55 Am. Dec. 91; Avakian v. Noble, 121 Cal. 216, 53 Pac. Rep. 559.

[6] Rhodes v. Roberts, 1 Stew. 145.

[7] Lienkauf v. Morris, 66 Ala. 413.

[8] Wilkinson v. Searcy, 76 Ala. 176; Sullivan v. Dee, 8 Ill. App. 263; Crymble v. Mulvaney, 21 Colo. 203, 40 Pac. Rep. 499; Willis v. Chowning, 18 Tex. Civ. App. 625, 46 S. W. Rep.

of a wilful levy upon exempt property, knowing it to be such, is an aggravating circumstance of the strongest character, and justifies the conclusion that it was done for the purpose of annoying or harassing the debtor, and supports the imposition of exemplary damages.[1]

In Arkansas the rule is that such damages ought not to be given unless in case of intentional violation of another's right, or when a proper act is done with an excess of force or violence, or with malicious intent to injure another in his person or property.[2] They cannot be recovered for the seizure and sale of a wife's goods under process against her husband, the officer believing them to be his, in the absence of malice or use of excess of force.[3] It has been ruled in Georgia that if the attorney of the plaintiff was present when a levy was made and did nothing to disapprove the act of the officer in making the levy, such act will be considered as having been made by the direction of the attorney, and with authority from his client. If the attorney knew, or had reasonable grounds for believing, that the property levied on did not belong to the defendant, he is chargeable with notice of the owner's title, and that notice was imputable to the client. Hence, the latter would be liable to the owner of the property for the actual damages resulting from the levy, and might, in the discretion of the jury, be subject to exemplary damages, if either, in the act or the intention, the tort was attended with circumstances of aggravation.[4] It is said in Alabama that if an officer seizes exempt property knowing it to be such, the fact is indicative of malice or a degree of recklessness equivalent thereto, and authorizes the imposition of such damages. But if he proceeds under a statutory bond of indemnity his discretion to execute the process is gone, and if he executes it without improper conduct the mere possession of such knowledge does not have that effect.[5] While the makers of such a bond,

45. But compare Van Storch v. Winslow, 13 R. I. 23, 43 Am. Rep. 10.

[1] Lynd v. Picket, 7 Minn. 128; Gardner v. Minea, 47 Minn. 295, 50 N. W. Rep. 199; Cronfeldt v. Arrol, 50 Minn. 327, 52 N. W. Rep. 857, 36 Am. St. 648; Matteson v. Munro, 80 Minn. 340, 83 N. W. Rep. 153.

[2] Kelly v. McDonald, 39 Ark. 393.

[3] Brown v. Allen, 67 Ark. 386, 55 S. W. Rep. 143.

[4] Jones v. Lamon, 92 Ga. 529, 18 S. E. Rep. 423.

[5] Alley v. Daniel, 76 Ala. 403.

given to induce an officer to levy on goods in the possession of one not a party to the process, may be liable for compensatory damages as co-trespassers,[1] their liability does not extend beyond that unless they authorized him to act wantonly, recklessly or maliciously, or such acts on his part were probably consequent on the making of the levy or were ratified by them.[2] In Illinois the subsequent ratification of a trespass does not subject the ratifying party to vindictive damages;[3] but this is not the rule in Texas, nor in California.[4] Where the plaintiff does not complain of injury to his person or his feelings, where no malice is shown, where no right is involved beyond a mere question of property, where there is a clear standard for the measure of damages and no difficulty in applying it, the measure is a question of law and is necessarily under the control of the court.[5] Such damages are the same in all actions; they do not depend on the form of the action and are not affected by it.[6] Where the trespass is not accompanied by any circumstances tending to aggravate the wrong and sufficient to justify exemplary damages the law applies in all cases the same uniform measure of relief for the property taken or injured.[7]

§ 1096. Damages for taking or destroying property. For the asportation or destruction of personal property, whereby [473] the owner is wholly deprived of it, he is entitled to recover its value at the time of the trespass, and interest thereon from that time. This is the minimum measure for an entire loss of the property. For any injury to it there is a right to a proportional recovery.[8] Interest is not always mentioned in the

[1] Screws v. Watson, 48 Ala. 628; Lovejoy v. Murray, 3 Wall. 1.

[2] Lienkauf v. Morris, 66 Ala. 406.

[3] Grand v. Van Vleck, 60 Ill. 487; Pardridge v. Brady, 7 Ill. App. 639; Douglas v. Hoffman, 72 id. 110.

[4] Brown v. Bridges, 70 Tex. 661, 8 S. W. Rep. 502; Avakian v. Noble, 121 Cal. 216, 53 Pac. Rep. 559.

[5] Berry v. Vreeland, 21 N. J. L. 187.

[6] McInvoy v. Dyer, 47 Pa. 118; Parrott v. Housatonic R. Co., 47 Conn. 575.

[7] Dorsey v. Manlove, 14 Cal. 553; Kelly v. McDonald, 39 Ark. 387; Black v. Robinson, 61 Miss. 54; Motley v. Southern Finishing & Warehouse Co., 122 N. C. 347, 30 S. E. Rep. 3; Brown v. Leath, 17 Tex. Civ. App. 262, 42 S. W. Rep. 665; Stephenson v. Wright, 111 Ala. 579, 20 So. Rep. 622.

[8] State v. Smith, 31 Mo. 566; Morris v. Williford, 70 S. W. Rep. 228 (Tex. Ct. of Civ. App.); Tootle v. Kent, — Okl. —, 73 Pac. Rep. 310; Walker v. Borland, 21 Mo. 289; Gray v. Stevens, 28 Vt. 1, 65 Am. Dec. 216; Clapp v. Thomas, 7 Allen, 188; Cool-

cases as part of the rule, and is, perhaps, not always intended. In England, and to some extent in this country, the allowance of it is left to the discretion of the jury; and they have been allowed to decide whether the value should be fixed at the date of the taking or conversion or at some later date before or at the time of the trial.[1] In a New Hampshire case, brought for

idge v. Choate, 11 Met. 79; Garretson v. Brown, 26 N. J. L. 425; Campbell v. Woodworth, 26 Barb. 648; Dorsey v. Manlove, 14 Cal. 553; Gilson v. Wood, 20 Ill. 37; Josey v. Wilmington, etc. R. Co., 11 Rich. 399; Thomas v. Isett, 1 G. Greene, 470; Scott v. Bryson, 74 Ill. 420; Brannim v. Johnson, 19 Me. 361; Conard v. Pacific Ins. Co., 6 Pet. 262; Pacific Ins. Co. v. Conard, Baldw. 138; Kennedy v. Whitwell, 4 Pick. 466; Lillard v. Whittaker, 3 Bibb, 92; Watts v. Potter, 2 Mason, 77; Dillenback v. Jerome, 7 Cow. 294; Ingram v. Rankin, 47 Wis. 406, 2 N. W. Rep. 765, 32 Am. Rep. 762; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; Briscoe v. McElween, 43 Miss. 556; Lienkauf v. Morris, 66 Ala. 406; Stix v. Keith, 85 id. 465, 5 So. Rep. 184; Kelly v. McDonald, 39 Ark. 387; Parrott v. Housatonic R. Co., 47 Conn. 575; Black v. Robinson, 61 Miss. 54; Block v. Sweeney, 63 Tex. 419; St. L., I. M. & S. R. v. Biggs, 50 Ark. 169, 6 S. W. Rep. 724; Smith v. Zent, 83 Ind. 86, 43 Am. Rep. 61; Georgia Pacific R. Co. v. Fullerton, 79 Ala. 298; Harrison v. Missouri Pacific R. Co., 88 Mo. 625; Keith v. Haggart, 4 Dak. 438, 33 N. W. Rep. 465; Atchison, etc. R. Co. v. Huitt, 1 Kan. App. 788, 41 Pac. Rep. 1051; L. & N. R. Co. v. Schweitzer, 11 Ky. L. Rep. 310 (Ky. Super. Ct.); Ludlow v. Steffen, 19 Ky. L. Rep. 1671, 44 S. W. Rep. 1119; Murray v. Mace, 41 Neb. 60, 59 N. W. Rep. 387; Watt v. Nevada Central R. Co., 23 Nev. 154, 173, 44 Pac. Rep. 423, 46 id. 726; Jacksonville, etc. R. Co. v. Peninsular Land, T. & M. Co., 27 Fla. 1, 119, 9 So. Rep. 661, 17 L. R. A. 33, 65; C., C., C. & St. L. R. Co. v. McKelvey, 12 Ohio Ct. Ct. 426; Chicago, etc. R. Co. v. Gitchell, 95 Ill. App. 1; Burchinell v. Butters, 7 Colo. App. 294, 43 Pac. Rep. 459; Hoffman v. Metropolitan Street R. Co., 51 Mo. App. 273; La Page v. Hill, 87 Me. 158, 32 Atl. Rep. 801; Fish v. Nethercutt, 14 Wash. 582, 45 Pac. Rep. 44, 53 Am. St. 892.

In Macias v. Sheriff, 43 La. Ann. 289, 8 So. Rep. 886, it not appearing that there was wantonness or malice on the part of the defendant in executing a writ of attachment, the goods were appraised at $1,200, afterward at $1,100, and sold at auction for $850. The court accepted the last sum as the value of the property, and made that, with interest, govern the recovery. Texas & P. R. Co. v. Payne, 15 Tex. Civ. App. 58, 38 S. W. Rep. 366, is to the contrary, and is in harmony with the weight of authority.

[1] Greening v. Wilkinson, 1 C. & P. 625; Reiss v. New York Steam Co., 59 N. Y. Super. Ct. 57, 12 N. Y. Supp. 557; Mairs v. Manhattan Real Estate Ass'n, 89 N. Y. 498, 507; Eddy v. Lafayette, 49 Fed. Rep. 807, 1 C. C. A. 441.

Toledo, etc. R. Co. v. Johnston, 74 Ill. 83, was for killing animals on a railroad. The trial court instructed the jury to add interest to the sum they should find as the value of the property from the date of the killing. This was held error, and the jury having found interest, the judgment was reversed. The court say, in such

negligently poisoning a horse, the court said that the market value of goods which have been destroyed is not the measure of the injured party's damages, but only evidence to be considered on that question, for a party may be greatly injured by the loss of goods which he cannot sell. The plaintiff was entitled to recover the money paid for the care of the horse when it was of no use to him, and such sum as would replace it by another as serviceable.[1] But this view is opposed to the weight of authority, and is sustained in the opinion by reference to only local cases.[2] There cannot be a recovery, in addition to the value of the thing destroyed, of the value of its use during such time as might be necessary to replace it.[3] If property is returned after being detained the damages are measured by its market value at the time and place of seizure, less such value when it was returned. "This value at time of seizure was not determinable alone by the price paid by plaintiff for the goods. That was merely one element of proof of value. The real value was what the goods were reasonably worth in the market at the time and in the condition that they were. If the plaintiff had obtained them for less than their market value he was entitled to the advantage of his purchase. But their value to him could not be ascertained by evidence of what, in the opinion of witnesses, he might have sold the goods for at auction if the contemplated sales had not been interrupted."[4]

§ 1097. Same subject; quantity of interest. The value a party is entitled to recover depends on the quantity of the interest he possesses or represents in the property which was the subject of the trespass. The plaintiff must have the actual

cases the damages must be compensatory only, unless circumstances of aggravation are shown.

If property held for sale is wrongfully seized under an attachment its owner is not entitled to interest on its value unless he shows some loss other than merely being deprived of its possession. Fullerton Lumber Co. v. Spencer, 81 Iowa, 549, 46 N. W. Rep. 1058.

[1] Seavey v. Dennett, 69 N. H. 479, 45 Atl. Rep. 247.

[2] See Watt v. Nevada Central R. Co., 23 Nev. 154, 173, 44 Pac. Rep. 423; Burke v. Louisville & N. R. Co., 7 Heisk. 456, 19 Am. Rep. 618; Wylie v. Smitherman, 7 Ired. 236; Jacksonville, etc. R. Co. v. Peninsular Land, T. & M. Co., 27 Fla. 1, 135, 17 L. R. A. 33, 65, 9 So. Rep. 661; C., C., C. & St. L. R. Co. v. McKelvey, 12 Ohio Ct. Ct. 422.

[3] Ft. Pitt Gas Co. v. Evansville Contract Co., 123 Fed. Rep. 63, — C. C. A. —.

[4] Palmer v. Augenstein, 18 D. C. App. Cas. 511.

possession, or a present right of possession when the trespass was committed in order to maintain this action.[1] The person in whom the general property is vested may maintain an action against a stranger, although he has never had the possession in fact, because the general property draws after it the right of possession.[2] One having the actual posses- [474] sion, as by finding,[3] or for a temporary purpose, as bailee or mortgagee,[4] or any other special property with possession,[5] may not only bring this action against a stranger who has taken possession without color of right, but may recover the

[1] Scott v. Bryson, 74 Ill. 420; Neely v. McCormick, 25 Pa. 255; Wilson v. Martin, 40 N. H. 88; Hume v. Tufts, 6 Blackf. 136; Weitzel v. Marr, 46 Pa. 463; Muggridge v. Eveleth, 9 Met. 233; Codman v. Freeman, 3 Cush. 306; Brown v. Thomas, 26 Miss. 335; Howe v. Farrar, 44 Me. 233; Aikin v. Buck, 1 Wend. 466, 19 Am. Dec. 535; Luce v. Hoisington, 54 Vt. 428; Wylie v. Ohio River & C. R., 48 S. C. 405, 26 S. E. Rep. 676.

[2] Ullman v. Barnard, 7 Gray, 558; Beaty v. Gibbons, 16 East. 116; Bro. Abb., Trespass, pl. 303, 346; 1 Add. on Torts, ¶ 524.

In an action by a member of the Creek nation to recover for hay cut by him on Creek lands it will be presumed, nothing being shown to the contrary, to have been lawfully harvested. Eddy v. Lafayette, 49 Fed. Rep. 807, 1 C. C. A. 441.

[3] Amory v. Delamirie, 1 Str. 504.

[4] Carter v. Fulgham, 134 Ala. 238, 32 So. Rep. 684; Browning v. Skillman, 24 N. J. L. 351; Swire v. Leach, 18 C. B. (N. S.) 479; Heydon and Smith's Case, 13 Coke, 69; Burton v. Hughes, 9 Moore, 339; Sutton v. Buck, 2 Taunt. 307; Lyle v. Barker, 5 Bin. 457; White v. Webb, 15 Conn. 302; Harker v. Dement, 9 Gill, 7; Faulkner v. Brown, 13 Wend. 63; Outcalt v. Durling, 25 N. J. L. 443; Ullman v. Barnard, 7 Gray, 554; Burke v. Savage, 13 Allen, 408; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Jones v. McNeil, 2 Bailey, 466; Alt v. Weidenburg, 6 Bosw. 176; Warren v. Kelley, 80 Me. 515, 532, 15 Atl. Rep. 49; Densmore v. Mathews, 58 Mich. 616, 26 N. W. Rep. 146; St. L., I. M. & S. R. v. Biggs, 50 Ark. 169, 6 S. W. Rep. 724; Laing v. Nelson, 41 Minn. 522, 43 N. W. Rep. 476; Dubois v. Spinks, 114 Cal. 289, 46 Pac. Rep. 95; Gillette v. Goodspeed, 69 Conn. 363, 37 Atl. Rep. 973; Jones v. Kellogg, 51 Kan. 263, 33 Pac. Rep. 997, 37 Am. St. 278; Howell v. Caryl, 50 Mo. App. 440; The Winkfield, [1902] Prob. 42, disapproving Claridge v. S. S. Tramway Co., [1892] 1 Q. B. 422. In the latter case a divisonal court ruled that the bailee of a horse injured while in his possession through the negligence of the defendant, but under circumstances which relieved the former from legal responsibility to the owner, could recover only nominal damages. This view is approved in 2 Beven on Negligence (2d ed.), 887; Clerk & Linsell on Torts (2d ed.), 237.

[5] Luse v. Jones, 39 N. J. L. 707; Northern Pacific R. Co. v. Lewis, 51 Fed. Rep. 658, 2 C. C. A. 446; Anthony v. New York, etc. R. Co., 162 Mass. 60, 65, 37 N. E. Rep. 780.

One who is under contract to maintain a county bridge may recover of another who destroyed it the outlay incurred in restoring it. Cue v. Breeland, 78 Miss. 864, 29 So. Rep. 850.

full value of the property. And though the plaintiff's possession be tortious as to the true owner he may recover against a stranger who divests him of it.[1] Such persons being bound to restore the property to the general owner or to stand responsible to him for its full value have the right to recover by that measure from the stranger who has wrongfully deprived them of it.[2] The amount which may be recovered by a *bona fide* purchaser, who has paid only a part of the purchase-money before notice of the fraudulent intent of his immediate vendor came to him, where the trespass is committed by an officer who has levied on behalf of creditors, is entirely dependent upon the extent of the plaintiff's liability to the vendor.[3] It has recently been held in the English court of appeal that a bailee in legal, as contradistinguished from actual, possession may in an action against a stranger for the loss of goods through his negligence recover their value though there would be no liability to the bailor for their loss.[4] If a mortgagor has surrendered his interest in the property to the mortgagee for no other consideration than the original mortgage the amount due thereon will limit the latter's recovery if the property destroyed was worth it.[5] If the first mortgagee waives his priority and lets the holder of a second mortgage in on the same footing they become tenants in common of the mortgaged property and

[1] Northern Pacific R. Co. v. Lewis, *supra;* Scott v. Bryson, 74 Ill. 420; McClure v. Hill, 36 Ark. 268; Hoyt v. Gelston, 13 Johns. 141; Hendricks v. Decker, 35 Barb. 298; Brown v. Ware, 25 Me. 411; Potter v. Washburn, 13 Vt. 558, 37 Am. Dec. 615; Carson v. Prater, 6 Cold. 565; Criner v. Pike, 2 Head, 398; Fletcher v. Cole, 26 Vt. 170.

As to the distinction between the possession necessary to maintain an action of trespass *de bonis asportatis* and an action of trespass on the case, see Northern Pacific R. Co. v. Lewis, 162 U. S. 366, 372, 16 Sup. Ct. Rep. 831.

[2] Harker v. Dement, 9 Gill, 7; Story on Bailm., § 280; Warren v. Kelley, 80 Me. 512, 532, 15 Atl. Rep. 49; Densmore v. Mathews, 58 Mich. 616, 26 N. W. Rep. 146; Hamilton v. Lau, 24 Neb. 59, 37 N. W. Rep. 688.

If a chattel, while in the possession of a bailee for hire, is injured by the negligence of a third person, and is repaired by the bailor, and the cost of the repair is charged to the bailee at his request, the latter, although he has not paid such cost, may maintain an action against the wrongdoer. Brewster v. Warner, 136 Mass. 57, 49 Am. Rep. 5.

[3] Riddell v. Munro, 49 Minn. 532, 52 N. W. Rep. 141.

[4] The Winkfield, [1902] Prob. 42, overruling Claridge v. South Staffordshire Tramway Co., [1892] 1 Q. B. 422.

[5] Warren v. Kelley, 80 Me. 512, 534, 15 Atl. Rep. 49.

can sue jointly for an interference therewith.[1] The satisfaction of a prior mortgage warrants a recovery by a second mortgagee of an amount equal at least to the extent that the trespass has diminished his security.[2]

The general owner of property in the hands of a bailee at the time of the taking may also maintain trespass if he has a present right to resume possession by the terms of the bailment, or in consequence of the wrongful act of the bailee or the defendant.[3] In either case only one recovery can be had; whether the action is brought by the special or general owner the recovery of full value by him ousts the other of his right of action; otherwise the trespasser would be liable to make a second satisfaction for the injury.[4] One tenant in common is not under such ulterior responsibility to his co-tenant as special owners are to the general owner, and therefore his recovery will be limited to his interest.[5] Where the action is between the general and special owner directly, or between others claiming under or in privity with them; between a plaintiff [475] having a qualified interest and a defendant who owns the residue or has an interest in or a charge upon it, the damages will be limited by the value of the plaintiff's interest.[6] One who

[1] Densmore v. Mathews, 58 Mich. 616, 26 N. W. Rep. 146.

[2] Taylor v. Hines, 31 Mo. App. 622.

[3] 1 Add. on Torts, ¶ 524; Scott v. Newington, 1 M. & Rob. 252.

[4] Luse v. Jones, 39 N. J. L. 707.

[5] Sedgworth v. Overend, 7 T. R. 279; Harker v. Dement, 9 Gill, 7.

[6] Street v. Sinclair, 71 Ala. 110; Brierly v. Kendall, 17 Q. B. 937; Huntley v. Bacon, 15 Conn. 267; Chamberlain v. Shaw, 18 Pick. 279, 29 Am. Dec. 586; Schindel v. Schindel, 12 Md. 108; Goulet v. Asseler, 22 N. Y. 225; Parish v. Wheeler, id. 494; Davidson v. Gunsolly, 1 Mich. 388; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Spicer v. Waters, 65 Barb. 227; Ward v. Henry, 15 Wis. 239; Cramer v. Marsh, 5 Colo. App. 302, 38 Pac. Rep. 612; Allen v. Davis, 53 Mo. App. 15.

In Noble v. Kelly, 40 N. Y. 415, a sheriff with three executions of different dates in his hands against one K., levied on and seized at one time, and by a single act, certain gold coin of the value of $1,000, the property of N. N. brought suit against him, in the nature of trespass, naming him as sheriff, and alleging the wrongful seizure to have been by him claiming to act as sheriff, "and under color of several pretended executions." The sheriff justified under the executions against K., setting them forth particularly. Before the trial N. executed to the sheriff a release, under seal, reciting a consideration of $10, releasing him as sheriff from all manner of action and actions, causes of action, suits, sums of money, trespasses, damages, claims and demands, whatsoever, he ever had, then had, or might have," by reason, on account, or in conse-

purchased from a third party property subject to the plaintiff's lien and removed it from the state, thereby destroying the power to effectuate the lien, was liable in an action on the case to the extent to which the lien might have been satisfied out of the property but for the wrongful act. If the property so removed was subject to a mortgage in favor of the defendant, which mortgage was prior to the plaintiff's lien, the recovery should be limited to the extent the property exceeded in value the amount due on the mortgage. But if the plaintiff makes a *prima facie* case for the recovery of the full value of the property the *onus* is on the defendant to show how much of that value was not diverted from the satisfaction of the mortgage lien, but was properly applied to it.[1]

§ **1098. Same subject; market value.** If the property of which the owner is deprived is a marketable commodity its market price is the value he is entitled to recover;[2] and this will govern though it would have been worth more to the plaintiff by reason of a particular contract he had entered into,[3] or for a purpose for which he had bought the property.[4] One who has destroyed property cannot be exempted from the payment of its value by showing that the plaintiff would subsequently have lost it in some other way.[5] The retail price

quence of any, or all and every, of his acts and proceedings under and by virtue, or in consequence, of the issuance and delivery to him of an execution," describing one of the executions in the sheriff's hands at the time of the levy. This release being pleaded by supplemental answer as a bar to the action, and a release of the whole cause of action, the court held it was neither; that it operated only as a release of the damages sustained by the plaintiff to the amount of the execution specified; and that the plaintiff was nevertheless entitled to recover as damages the value of the coin seized, after deducting the amount so covered by the release.

If an officer seizes mortgaged property without complying with a statute which requires him to pay or tender the mortgagee the amount of his debt and the interest thereon, he is liable for the total amount of those items. Wood v. Franks, 56 Cal. 217.

[1] Hamilton v. Phillips, 120 Ala. 177, 24 So. Rep. 587, 74 Am. St. 29.

[2] Coolidge v. Choate, 11 Met. 79; Gardner v. Field, 1 Gray, 151; Brown v. Allen, 35 Iowa, 306; Suydam v. Jenkins, 3 Sandf. 620; State v. Smith, 31 Mo. 566; Watt v. Nevada Central R. Co., 23 Nev. 154, 173, 44 Pac. Rep. 423, citing the text.

[3] Brown v. Allen, 35 Iowa, 306; Gardner v. Field, 1 Gray, 151. But see France v. Gaudet, L. R. 6 Q. B. 199.

[4] Palmer v. Augenstein, 18 D. C. App. Cas. 511.

[5] Hubbard v. New York, etc. R. Co., 70 Conn. 563, 40 Atl. Rep. 533; Bear v. Harris, 118 N. C. 476, 24 S. E. Rep. 364.

of property held for sale is not the standard by which its value is to be determined. Where a quantity of merchandise is sued for the retail price would be unjust, for the merchant in fixing that price takes into consideration not only the first cost of the goods, but store rent, clerk hire, insurance, and probable amount of bad debts, and adds to all these a [476] percentage of profit.[1] This must be understood of a considerable quantity, not of a single article. The owner must be entitled to recover at such rate as he would have to pay in the nearest market where a like quantity could be bought to replace the property taken;[2] added to this, no doubt, should be the expense necessarily incurred in getting the property so purchased to the place where the trespass was committed. This would make the damages depend upon the value of the property taken at the place where the wrong was done.[3] The rule is thus expressed in some cases, with the addition that the estimate is to be made as of the time the right of action accrued,[4] and compensation for the time required to obtain other property to replace that destroyed.[5] In a case in which hay was burned at a place where there was no market value for it, and the plaintiff had no immediate, but only a contingent prospective, use for it, his recovery was limited to the market value at the nearest place at which there was a market for it, less the cost of putting it on the market.[6] The injury done by taking property may be enhanced by depriving the owner of the opportunity or ability to make profits; an established business may thus be destroyed. If he is able to show gains, thus prevented with the requisite certainty he is entitled to compensation for them.[7] Under a general allegation of damages

[1] State v. Smith, 31 Mo. 566; Butler v. Collins, 12 Cal. 457; Nightingale v. Scannell, 18 Cal. 315; Heidenheimer v. Schlett, 63 Tex. 394; Texas & P. R. Co. v. Payne, 15 Tex. Civ. App. 58, 38 S. W. Rep. 366, quoting the text.

[2] Cassin v. Marshall, 18 Cal. 689; Waters v. Langdon, 16 Vt. 570; Starkey v. Kelley, 50 N. Y. 677; Baker v. Drake, 66 N. Y. 524; Gruman v. Smith, 81 N. Y. 25; Chicago, etc. R. Co. v. Gitchell, 95 Ill. App. 1, citing the text.

[3] Texas & P. R. Co. v. Payne, *supra*.

[4] Heidenheimer v. Schlett, 63 Tex. 394; Block v. Sweeney, id. 419; Baker v. Drake, Gruman v. Smith, *supra*. Subsequent changes in the price of property injured do not affect the amount of the recovery. Lacy v. Winn, 4 Pa. Dist. Rep. 409.

[5] Fernwood Masonic Hall Ass'n v. Jones, 102 Pa. 307.

[6] Watt v. Nevada Central R. Co., 23 Nev. 154, 172, 44 Pac. Rep. 423.

[7] Fernwood Masonic Hall Ass'n v.

evidence is admissible to show the value of the property destroyed for the special purpose for which it was used, and the market value in the locality of property fitted for such purpose is the measure of the plaintiff's damages.[1]

§ 1099. Same subject; non-marketable property. Where the property is not marketable its value must be ascertained by such proof as the nature of the case admits of. One criterion of damage may be its actual value to the owner, and this is the rule where it is chiefly or exclusively valuable to him. Such articles as family pictures, plate and heirlooms should be valued with reasonable consideration of and sympathy with the feelings of the owner.[2] Where the portrait of the owner's father was lost by the negligence of a carrier this rule was applied, the court adding that in its application the jury should take into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner.[3] The testi- [477] mony of the plaintiff that he had no other portrait of his father was held to bear on the question of the actual value to him and was competent. In an action for the conversion of plates for printing labels and advertisements of great value

Jones, *supra;* Atlanta v. Dooley, 74 Ga. 702; Halcomb v. Stubblefield, 76 Tex. 310, 13 S. W. Rep. 231; Albert v. Blecker Street, etc. R. Co., 2 Daly, 389; Thomas v. Isett, 1 G. Greene, 470; Freidenheit v. Edmundson, 36 Mo. 226; Allred v. Bray, 41 Mo. 484, 97 Am. Dec. 283; Milburn v. Beach, 14 Mo. 104, 55 Am. Dec. 91; Luse v. Jones, 39 N. J. L. 707; Strasberger v. Barber, 38 Md. 103; Davenport v. Ledger, 80 Ill. 574; Oviatt v. Pond, 29 Conn. 479; Tootle v. Kent, — Okl. —, 73 Pac. Rep. 310; Kyd v. Cook, 56 Neb. 71, 76 N. W. Rep. 524, 71 Am. St. 661.

In Wehle v. Butler, 61 N. Y. 245, on an irregular attachment, the party therein named as creditor caused a stock of goods to be seized; they were the stock of a retail merchant of fancy goods, and her business was thus entirely broken up. The attachment was set aside and trespass brought for the goods. It was held that the plaintiff was entitled "to recover as part of her damages the fair retail value of her goods unlawfully taken." Reynolds, C., for the court, remarked: "That was the nature of her business as a merchant, and the goods were, doubtless, purchased with reference to it." See Wehle v. Haviland, 69 N. Y. 448; § 1102.

[1] Loesch v. Koehler, 144 Ind. 278, 41 N. E. Rep. 326, 43 id. 129, 35 L. R. A. 682.

[2] Suydam v. Jenkins, 3 Sandf. 620; Spicer v. Waters, 65 Barb. 227; Bateman v. Ryder, 106 Tenn. 712, 64 S. W. Rep. 48, quoting the text and applying the doctrine of it to an action for conversion. See § 1117.

[3] Green v. Boston, etc. R. Co., 128 Mass. 231, 35 Am. Rep. 370. See § 919.

to the owner, but of very trifling value to others, the measure of damages was held to be the value to him, and that in estimating this the cost of replacing the plates might be considered.[1] Where a display advertisement was obliterated the wrong-doer was liable for the expense of restoring it.[2] On the destruction of a sign board the plaintiff cannot recover for loss of rents for advertising space thereon, for he could have replaced the board at once. The defendant may show that the right to maintain the board would soon expire.[3] Where trespass was brought for destroying a picture on exhibition and it appeared that it was libelous to the defendant and his sister, under the general issue the plaintiff was only allowed to recover for the canvas and paint. Lord Ellenborough held that because it was libelous it could not be valued as a work of art.[4] The devisees and legatees under a will wrongfully spoliated after the testator's death may recover as part of the damages the reasonable fees paid for attorneys' services in having it admitted to probate.[5] The recovery measured by the value and interest is not peculiar to trespass, and requires no further elucidation in this connection.[6]

§ 1100. Special and consequential damages. The value and interest are not always a compensation for the injury; as, if one takes from his neighbor the beasts of the plow in seed time, or the implements of husbandry in harvest, whereby he is prevented from sowing his seed or reaping his corn, it is obvious that the value of the thing taken may be the smallest part of the injury.[7] It is intimated in New Jersey that there may be liability for the loss of crops if a trespass prevents the sowing of seed or the reaping of grain.[8] But in Alabama and Vermont it is held that such damages are too remote when

[1] Stickney v. Allen, 10 Gray, 352; Sell v. Ward, 81 Ill. App. 675, citing the text.

[2] Shiverick v. Gunning, 58 Neb. 29, 78 N. W. Rep. 460.

[3] Ludlow v. Steffen, 19 Ky. L. Rep. 1671, 44 S. W. Rep. 1119.

[4] Du Bost v. Beresford, 2 Camp. 511.

[5] Taylor v. Bennett, 1 Ohio Ct. Ct. 95.

Testimony that the plaintiff was put to some loss of time, expense of board, etc., by reason of the destruction of legal papers does not authorize a recovery of damages for their destruction; the reasonable value of the papers is the measure of damages. Bourke v. Whiting, 19 Colo. 1, 34 Pac. Rep. 172.

[6] See § 105.

[7] Woolley v. Carter, 7 N. J. L. 85.

[8] Id.

they result from the seizure of animals used for the purpose of husbandry.[1] One who sells his horses at a sacrifice because he had no place in which to keep them after the destruction of his barn and could get no place cannot recover for his loss in that respect. The law takes no notice of the pecuniary conditions of litigants; the sale was not the natural and proximate result of the wrong done.[2] The damages resulting from a party's inability to continue business because of the taking away of part of his stock, in consequence of which he sold the remainder for less than their value, are too remote, at least where there is no proof of malice or bad faith justifying exemplary damages.[3] If no recovery is sought for injury to the plaintiff's business the fact that he is a dairyman cannot affect his recovery for the loss of cows.[4] Where a husband and wife sued for a wrongful attachment of merchandise it was held that she could not recover for loss caused him by being thrown out of employment.[5] Where a plaintiff owned a fishery and net on a river; had men employed to assist him in fishing, and while his net was in the river the defendant ran his vessel through and injured it so as to delay the use of it, it was held that in addition to the damage to the net he was entitled to show these facts and also the facts concerning the running of shad and the number caught on the preceding day, with a view to compensation for the loss of the benefits of the use. "The whole loss sustained," said the court, "is to be taken into view; and this depends on its use, its profits, the particular season or time, or occasion of the injury done, and the benefits or advantages lost thereby. And if so, all these must necessarily be proven and submitted to the consideration of the jury."[6] The defendant stopped the plaintiff's team and took [478] out one horse, thereby not only depriving him of the service of that animal, but subjecting him to delay and trouble

[1] Street v. Sinclair, 71 Ala. 110; Luce v. Hoisington, 56 Vt. 436.

[2] Chandler v. Smith, 70 Ill. App. 658; L. & N. R. Co. v. Tippenhauer, 10 Ky. L. Rep. 401 (Ky. Super. Ct.).

[3] Caspar v. Klippen, 61 Minn. 353, 63 N. W. Rep. 737, 52 Am. St. 604.

[4] Parrin v. Montana Central R. Co., 22 Mont. 290, 56 Pac. Rep. 315.

[5] Rains v. Herring, 68 Tex. 468, 5 S. W. Rep. 369.

[6] Post v. Munn, 4 N. J. L. 61, 5 Am. Dec. 570; Sniveley v. Fahnestock, 18 Md. 391. See Wright v. Mulvaney, 78 Wis. 89, 46 N. W. Rep. 1045, 23 Am. St. 393, 9 L. R. A. 807, denying recovery of profits under the testimony.

in respect to the others in the team and his journey. The court held that in this action he could recover not only for the force and breach of the peace, but for stopping his team in order to take the horse.[1] In estimating the damages for a wrongful seizure of the furniture of a boarding-house it has been held proper to prove that there were guests in the house, and that applicants for board had to be turned away before, with reasonable diligence, the house could be refurnished, with a view to showing annoyance and injury to business to increase damages.[2] If a place of business is closed the time during which it remained so pending a motion to quash the execution and levy may be considered in assessing damages.[3] And the rent for which the plaintiff is liable may be recovered.[4] Where property used by a railroad contractor for sheltering his men and horses was seized the loss of men for the want of a place to shelter them, the expense of providing another shelter and the protraction of the time required to perform the work contracted to be done were elements of damage.[5] Where the plaintiff's furnace was destroyed and the defendant refused to replace it testimony was admissible to show the ill health of the plaintiff's child at the time of and immediately after the wrong was done, and the inconvenience to which the plaintiff was put in taking care of the child as the result of the wrong.[6]

§ 1101. Same subject. The defendant will be liable for such consequential damages, resulting from his interference with the plaintiff's property, as might reasonably be expected in the usual and natural course of things to ensue from his act, whether his interference be to take and carry away or to injure or destroy it.[7] Where a horse was injured by a collision

[1] Shafer v. Smith, 7 Har. & J. 67.

Where animals are lost the loss of time resulting therefrom is not an element of damage. Churchman v. Kansas City, 44 Mo. App. 665.

[2] Luse v. Jones, 39 N. J. L. 707; Davenport v. Ledger, 80 Ill. 574.

[3] MacVeagh v. Bailey, 29 Ill. App. 606.

[4] Hough v. Dickinson, 58 Mich. 89, 24 N. W. Rep. 809.

[5] Carlisle v. Callahan, 78 Ga. 320, 2 S. E. Rep. 751.

[6] Vogel v. McAuliffe, 18 R. I. 791, 31 Atl. Rep. 1.

[7] See § 43; McAfee v. Crofford, 13 How. 447; Johnson v. Courts, 3 Har. & McHen. 510; Oleson v. Brown, 41 Wis. 413; Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689; Bishop v. Williamson, 11 Me. 495; Atchison v. Steamboat, 14 Mo. 63; Murray v. Mace, 41 Neb. 60, 59 N. W. Rep. 387.

the damage was held to include the diminution of his market value, sums paid and the value of services performed in a reasonable attempt to cure him and the loss of his use while he was under treatment, up to the limit of his value;[1] the hire of another horse in the meantime cannot be included.[2] But we see no reason why, under proper pleadings, the expense of hiring another horse to take the place of the one injured is not recoverable if the owner has acted judiciously.[3] It has been held otherwise as to the pay of the driver of an injured horse and the expense of keeping the latter while repairs are being made to the wagon.[4] Where four horses, used for plantation purposes, were injured, one to its full value and one but slightly, the others being harmed to an intermediate extent, it was held that the owner could not keep them grouped as a team and charge for the loss of their use, especially if he had other horses with which to supply their places. The cost of making a change in the make-up of the team would be a proper item of damages. As to the horse fatally injured the loss of the use was not recoverable on any basis.[5] There may be a recovery for an injury to a horse which affects his disposition for steadiness and gentleness; depreciation in value from

[1] Gillett v. Western R. Co., 8 Allen, 560; Atlantic R. Co. v. Hudson, 62 Ga. 679; Johnson v. Holyoke, 105 Mass. 80; Keyes v. Minneapolis, etc. R. Co., 36 Minn. 290, 30 N. W. Rep. 888; Wheeler v. Townshend, 42 Vt. 15; Street v. Laumier, 34 Mo. 469; Shelbyville, etc. R. Co. v. Lewark, 4 Ind. 471; New Haven Steamboat & T. Co. v. Vanderbilt, 16 Conn. 420; Williamson v. Barrett, 13 How. 101; I. & G. N. R. Co. v. Cocke, 64 Tex. 151; Central R. & B. Co. v. Warren, 84 Ga. 329, 10 S. E. Rep. 918 (expense of feed and cure). *Contra*, McLaughlin v. Bangor, 58 Me. 398 (as to loss of use).

While the owner of property which is employed in an illegal business may recover its value, he is not entitled to special damages because the taking of it resulted in breaking up his business. Smith v. Dinkelspiel, 91 Ala. 528, 8 So. Rep. 490.

[2] Hughes v. Quentin, 8 C. & P. 703; Barrow v. Arnaud, 8 Q. B. 595; Edwards v. Beebe, 48 Barb. 106.

[3] Hutton v. Murphy, 9 N. Y. Misc. 151, 29 N. Y. Supp. 70; Layton v. Brady, 1 N. Y. Misc. 519, 20 N. Y. Supp. 538; Smith v. Consumers' Ice Co., 52 N. Y. Super. Ct. 430, 857; Schalscha v. Third Avenue R. Co., 19 N. Y. Misc. 141, 43 N. Y. Supp. 251; Volkmar v. Same, 28 N. Y. Misc. 141, 58 N. Y. Supp. 1021; Wellman v. Miner, 19 N. Y. Misc. 644, 44 N. Y. Supp. 417; Hoffman v. Metropolitan Street R. Co., 51 Mo. App. 273.

[4] Newell v. Smith, 28 N. Y. Misc. 182, 58 N. Y. Supp. 1025. It is otherwise as to the expense of keeping the injured animal in Louisiana. Fusch v. Egan, 48 La. Ann. 60, 19 So. Rep. 108.

[5] Tift v. Towns, 63 Ga. 237.

such cause is not too remote and uncertain.[1] Where horses attached to a sleigh were struck and thereby caused to run, so as to throw off a load on the sleigh, break the harness, etc., the labor and trouble of reloading, the delay in getting to the place of destination, the time and expense lost in making repairs and the injury done to the horses by causing them to run away, though they were not physically injured, were elements of damage.[2]

In Michigan the proper rule of damages, where animals are injured, is their reduced value. It is said: "There may be peculiar and exceptional circumstances which would possibly sometimes justify a different rule, but they must be very peculiar. But there is no difficulty in replacing beasts by others adapted to similar service, and the difference between the value before and after the accident will enable the owner to be fully indemnified,"[3] or after the cure,[4] including the expense thereof.[5] The fact that the care and expense bestowed upon an injured animal proves ineffectual does not affect the right to recover therefor, it having been given in good faith.[6] Where the defendant's rams escaped from his premises and entered upon those of the plaintiff and got his ewes with lamb out of season so that the lambs were dropped during cold weather, the damages were not measured by the value of the lambs which perished because of the inclemency of the season, but by the difference between the value of the ewes as they were at the time of the trespass and thereafter.[7] On principles which are elsewhere fully stated,[8] the owner of property which is damaged cannot, if it possesses elements of value which it is practicable for him to utilize, abandon it and claim its full value from the wrong-doer. He must use reasonable exertions

[1] Oliphan v. Brearley, 54 N. J. L. 521, 24 Atl. Rep. 660; Oleson v. Brown, 41 Wis. 413.

[2] Oleson v. Brown, 41 Wis. 413, approved in Hughes v. Austin, 12 Tex. Civ. App. 178, 187, 33 S. W. Rep. 607.

[3] Davidson v. Michigan Central R. Co., 49 Mich. 428, 13 N. W. Rep. 804; Hoffman v, Metropolitan Street R. Co., 51 Mo. App. 273.

[4] Shaw v. Missouri & K. Dairy Co., 56 Mo. App. 521.

[5] Cookman v. Nill, 81 Mo. App. 297.

[6] Gulf, etc. R. Co. v. Keith, 74 Tex. 287, 11 S. W. Rep. 1117.

[7] Stearns v. McGinty, 55 Hun, 101, 8 N. Y. Supp. 216; Baker v. Mims, 14 Tex. Civ. App. 413, 37 S. W. Rep. 190; New York, etc. R. Co. v. Estill, 147 U. S. 591, 13 Sup. Ct. Rep. 444.

[8] § 157.

to realize whatever of value it might have.[1] Generally no allowance can be made for the expenses of the litigation to procure redress for the injury by trespass beyond taxable costs; they are regarded as full compensation.[2] Such expenses have [479] been disallowed even in cases where exemplary damages may be assessed;[3] but it is otherwise in some states.[4] Injury

[1] Harrison v. Missouri Pacific R. Co., 88 Mo. 625; Illinois Central R. Co. v. Finnigan, 21 Ill. 646; Dean v. Chicago & N. R. Co., 43 Wis. 305; Georgia Pacific R. Co. v. Fullerton, 79 Ala. 298; Chicago, etc. R. Co. v. Metcalf, 44 Neb. 848, 63 N. W. Rep. 51, 28 L. R. A. 824.

[2] Cottrell v. Russell, 21 Mo. App. 1; Mix v. Kepner, 81 Mo. 96; Jacobus v. Monongahela Nat. Bank, 35 Fed. Rep. 395; Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Falk v. Waterman, 49 Cal. 224; St. Peter's Church v. Beach, 26 Conn. 355; Fairbanks v. Witter, 18 Wis. 287, 86 Am. Dec. 765; Park v. McDaniels, 37 Vt. 594; Barnard v. Poor, 21 Pick. 378; Rutland, etc. R. Co. v. Bank, 32 Vt. 639; Kelly v. Rogers, 21 Minn. 146; Harris v. Eldred, 42 Vt. 39; Earl v. Tupper, 45 Vt. 275; Good v. Mylin, 8 Pa. 51, 49 Am. Dec. 493; Howell v. Scoggins, 48 Cal. 355; Stopp v. Smith, 71 Pa. 285; Hatch v. Hart, 2 Mich. 289; Warren v. Cole, 15 Mich. 265; Worthington v. Morris, 98 Ky. 54, 32 S. W. Rep. 269.

In Harris v. Eldred, 42 Vt. 39, the owner of property which had been wrongfully taken from him sought in an action for the tort to recover, among other damages, the expenses of a legal proceeding in New York, by which he regained possession. They were disallowed; not on the assumption that they were recovered or recoverable in the suit in New York. They were deemed not allowable equally whether the laws of New York provided for costs to the prevailing party in such proceedings or not; because the costs of another action are not allowable. It is difficult to reconcile the reasoning on which this conclusion was reached with the doctrine of Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268. That case recognizes the right of the injured party to employ judicious agencies to recover his property, and to recover the expenses in an action for the wrongful taking. The law is settled in favor of their allowance. Why discriminate against the expenses of a judicious and appropriate proceeding in court to obtain possession; if they are not measurable by taxation and to be collected as costs in that proceeding?

[3] Falk v. Waterman, 59 Cal. 224; Earl v. Tupper, 45 Vt. 275; Howell v. Scoggins, 48 Cal. 355.

[4] Anderson v. Sloane, 72 Wis. 566, 40 N. W. Rep. 214, 7 Am. St. 885; Dibble v. Morris, 26 Conn. 416; Seeman v. Feeney, 19 Minn. 79; Titus v. Corkins, 21 Kan. 722; Roberts v. Mason, 10 Ohio St. 277; Marshall v. Bitner, 17 Ala, 832; Bracken v. Neill, 15 Tex. 109; New Orleans, etc. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Thompson v. Powning, 15 Nev. 210; Gilkerson-Sloss Commission Co. v. Yale, 47 La. Ann. 690, 17 So. Rep. 244; Perry v. White, 33 N. B. 41.

The code of Georgia, § 2942, provides that the expenses of litigation are not generally allowed as part of the damages; but if the defendant has acted in bad faith or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. Guernsey v. Shellman, 59 Ga. 797.

done to the plaintiff's credit by wrongfully suing out an attachment against his property is too remote to be a ground of damage,[1] though it is not so regarded in Nebraska[2] or Oklahoma.[3] The mere wrongful suing out of a writ of sequestration and, without violence to the person of the defendant therein, depriving him of the possession and use of his property was not cause for the recovery of damages for mental suffering unless the circumstances were such as warrant the infliction of exemplary damages,[4] though the property seized was exempt from execution.[5] In North Carolina there cannot be a recovery for mental anguish arising out of the wrongful seizure of property, though it was attended with circumstances of aggravation, but exemplary damages may be recovered.[6] In Nebraska such suffering is not an element of damages where the act charged is simply unlawful because in violation of the property rights of the plaintiff. There is a marked distinction between such a case and one in which the unlawful act was inspired by fraud, malice or like motives. As to those last named, it is said, in the opinion, the case is free from doubt. In all such cases mental suffering is a legitimate element of damage.[7]

§ 1102. Same subject. In an early Connecticut case trespass was brought for carrying away a spar which the plaintiff had procured to be used as a mast for a vessel he was building. The fact of the taking having been established, the plaintiff offered to prove in aggravation of damages that he was building a cutter and had procured the spar for her mast; that there was no other spar on the Connecticut river suitable for

[1] Landes v. Eichelberger, 2 Tex. Civ. Cas. 127; Crymble v. Mulvaney, 21 Colo. 203, 40 Pac. Rep. 499; Union Nat. Bank v. Cross, 100 Wis. 174, 187, 79 N. W. Rep. 992.

[2] Meyer v. Fagan, 34 Neb. 184, 51 N. W. Rep. 753; Kyd v. Cook, 56 Neb. 71, 76 N. W. Rep. 524, 71 Am. St. 661.

[3] Tootle v. Kent, — Okl. —, 73 Pac. Rep. 310.

[4] Williams v. Yoe, 19 Tex. Civ. App. 281, 46 S. W. Rep. 659, citing Trawick v. Martin-Brown Co., 79 Tex. 460, 14 S. W. Rep. 564; Crawford v. Doggett, 82 Tex. 139, 17 S. W. Rep. 929, 27 Am. St. 859; Gulf, etc. R. Co. v. Trott, 86 Tex. 412, 25 S. W. Rep. 419, 40 Am. St. 866.

[5] Morris v. Williford, 70 S. W. Rep. 228 (Tex. Ct. of Civ. App.).

[6] Chappell v. Ellis, 123 N. C. 259, 31 S. E. Rep. 709, 68 Am. St. 822.

[7] Murray v. Mace, 41 Neb. 60, 66, 59 N. W. Rep. 387. citing Day v. Woodworth, 13 How. 363; Cutler v. Smith, 57 Ill. 252; Jamison v. Moon, 43 Miss. 598; Brown v. Allen, 35 Iowa, 306; Merrils v. Tariff Manuf. Co., 10 Conn. 384.

that purpose, and that these facts were known to the defendant; that the taking was malicious, and with intent to obstruct the plaintiff, and he was obstructed and delayed in the building for several months. The evidence was erroneously rejected. Smith, J., remarked, speaking for the court: "In actions founded on tort the first object of the jury should be to remunerate the injured party for all the real damage he has sustained. In doing this the value of the article taken or destroyed forms one item; there may be others; and in this case [480] I think there were others. The interruption and delay which occurred in the building of a cutter might be, and probably was, a serious injury; and to show that this interruption and delay was a necessary consequence of the trespass it was proper to prove that no other mast could be procured on the river; for if it had been an article easily to be obtained, and like many others could be procured at any time in the market, no such interruption or delay could be attributed to the taking of it. . . . I have no doubt that the damages claimed in this case were sufficiently immediate. If a man should with force take the horse of another while from home on a journey, the interruption of the journey and the delay occasioned by it would not be too remote to be assessed by way of damages. I can see no difference between that case and many others of the same sort which might be put, if further illustrations were necessary, and the present. The damage is the natural and necessary consequence of the trespass and cannot be attributed essentially to any other cause."[1]

In a late Wisconsin case a stock of goods was seized under executions based upon invalid judgments by confession. The store was closed and the goods held therein for twenty-six days, after which they were delivered to the plaintiff's assignee, plaintiff in the meantime having made an assignment for the benefit of his creditors. The executions were levied in good faith. The trial court held that damages included: 1. The attorney's fees and commissions carried into the confessed judgments, and paid by the plaintiff in order to get possession of the property levied upon. 2. His expenditures for attorney's

[1] Churchill v. Watson, 5 Day, 140, 5 Am. Dec. 130; McAfee v. Crofford, 13 How. 447.

services in getting the judgments and executions set aside. 3. The whole expenses of the assignee under the assignment, including a sum claimed to have been paid by him in conducting and closing up the assignment for attorney's fees. 4. The probable profits the plaintiff would have made from the time of the seizure until the end of one year after the remnant of the goods were received by him from the assignee. 5. For loss because the assignee was forced to sell otherwise than in the usual course of trade. 6. For injury to feelings. The appellate court held that the value of the goods, they having been received by the plaintiff before the action for the trespass was begun, was immaterial except so far as it bore upon the other items which were elements of damage. These were: 1. Interest on that value from the time of the seizure until the goods were surrendered or, at least, at the option of the plaintiff, in lieu of such interest, the value of his business during that time. 2. Any depreciation in the value of the goods during the same time.[1] 3. The expenses incurred in obtaining a return of the goods, including the sum paid for the costs included in the judgments referred to and fees for executing the executions, and any expenses by way of rent of the store and clerk hire while the defendant was in possession; also money necessarily paid for legal services in proceedings to set aside the judgments and executions. There was no liability for lost profits.[2] The assignment made by the plaintiff was not the

[1] Depreciation of asported property through the negligence of the defendant is an element of damage. Bibb v. Jones, 12 Ky. L. Rep. 605 (Ky. Super. Ct.); Harris v. Davis, 13 id. 736 (Ky. Super. Ct.). And so is a loss resulting from a decline in market value. Chesmore v. Barker, 101 Iowa, 576, 70 N. W. Rep. 701.

[2] The opinion, by Taylor, J., cites as adverse to the allowance of profits, Beveridge v. Welch, 7 Wis. 465; Bierbach v. Goodyear Rubber Co., 54 id. 208, 11 N. W. Rep. 514, 41 Am. Rep. 19; Blair v. Milwaukee, etc. R. Co., 20 Wis. 262; Masterson v. Mount Vernon, 58 N. Y. 391, 396; Higgins v. Mansfield, 62 Ala. 267; Holiday v. Cohen, 34 Ark. 707; Heath v. Lent, 1 Cal. 412; Tobin v. Post, 3 id. 373; Oviatt v. Pond, 29 Conn. 479; Water Lot Co. v. Leonard, 30 Ga. 560; Green v. Williams, 45 Ill. 206; Cilley v. Hawkins, 48 id. 308; Chicago, etc. R. Co. v. Howison, 86 Ill. 215; Glass v. Garber, 55 Ind. 336; Campbell v. Chamberlain, 10 Iowa, 337; Lowenstein v. Monroe, 55 id. 82, 7 N. W. Rep. 406; Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. Rep. 462; Boyd v. Brown, 17 Pick. 453; Brown v. Smith, 12 Cush. 366; Simmer v. St. Paul, 23 Minn. 408; Cincinnati v. Evans, 5 Ohio St. 594; Bates v. Clark, 95 U. S. 209; Smith v. Condry, 1 How. 28; Bazon v. Steamship Co., 3 Wall.

legal effect of the defendant's acts, and he was not chargeable with any losses resulting from it.[1] There being no proof of malice or insult, damages for injury to the feelings were not recoverable.[2] In Nebraska and Oklahoma lost profits resulting from the wrongful attachment of a merchant's goods may be recovered in so far as the loss is such as might ordinarily be expected to follow such act.[3]

As we have seen, there may be a recovery for the depreciation in the value of goods during the time they have been withheld from the owner. "The reason," says Justice Winslow, "is plainly because the goods are kept for the purpose of sale, and, had they not been seized, they might have been sold at their value when seized. But when property kept for use, and not for sale, is attached, the reason no longer holds good, because there is no presumption that the property would or could have been sold, but the presumption is to the contrary." Hence, there cannot be a recovery, under the guise of depreciation in value, of damages for injuries to business, credit, and reputation, resulting from the stoppage of business by an attachment. In case of a wrongful attachment, there may be a recovery for the loss of the use of property held for use, and not for sale, and for any damage done it by wear or tear or negligent care while in the hands of the officer.[4]

§ 1103. Expenses to recover, restore and protect property. If the owner regains possession or the property is restored to and accepted by him it will go in mitigation; then his claim for damages will be for the taking and detention.[5]

Jr. 229; Wallace v. Finberg, 46 Tex. 36; Miller v. Jannett, 63 id. 82; Weeks v. Prescott, 53 Vt. 73; Dennis v. Stoughton, 55 Vt. 371. Wright v. Mulvaney, 78 Wis. 89, 46 N. W. Rep. 1045, 23 Am. St. 393, 9 L. R. A. 807; Casper v. Klippen, 61 Minn. 353, 63 N. W. Rep. 737, 52 Am. St. 604, citing several local cases, and distinguishing Goebel v. Hough, 26 Minn. 252, 2 N. W. Rep. 847; Crymble v. Mulvaney, 21 Colo. 203, 40 Pac. Rep. 499, are to the same effect.

[1] Citing Walker v. Fuller, 29 Ark. 448, 458; Donnell v. Jones, 13 Ala. 490, 513, 48 Am. Dec. 59.

[2] Anderson v. Sloane, 72 Wis. 566, 40 N. W. Rep. 214, 7 Am. St. 885, citing Donnell v. Jones, *supra*.

[3] Meyer v. Fagan, 34 Neb. 184, 51 N. W. Rep. 753; Kyd v. Cook, 56 Neb. 71, 76 N. W. Rep. 524, 71 Am. St. 661; Tootle v. Kent, — Okl. —, 73 Pac. Rep. 310.

[4] Union Nat. Bank v. Cross, 100 Wis. 174, 186, 79 N. W. Rep. 992. Compare Tootle v. Kent, *supra*, as to recovery for injury to credit.

[5] Anderson v. Sloane, 72 Wis. 566, 40 N. W. Rep. 214, 7 Am. St. 885; Reynolds v. Shuler, 5 Cow. 326; Murray v. Burling, 10 Johns. 172; Walker

The owner may reasonably exert himself to recapture his property.[1] He is entitled to compensation for such exertions,[2] and also for moneys expended for the same purpose in a judicious and reasonable manner — in necessary purchases of the property,[3] in satisfying charges thereon,[4] or in offering and paying a reasonable reward for its return.[5] One who wrongfully causes the satisfaction of a judgment to be stricken from the record must answer for the costs and expenses, including counsel fees and printing, in proceedings brought to obtain a reversal of the action of the inferior court and in a writ of restitution.[6] The owner of property may protect it from threatened danger and resort to reasonable expedients for that

v. Fuller, 29 Ark. 448; Jones v. McNeil, 2 Bailey, 466; Barrelett v. Bellgard, 71 Ill. 280; Hanmer v. Wilsey, 17 Wend. 91; Coffin v. Field, 7 Cush. 355; Kaley v. Shed, 10 Met. 317; Clapp v. Thomas, 7 Allen, 188.

[1] Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532.

[2] Keith v. Haggart, 4 Dak. 438, 33 N. W. Rep. 465; Jones v. Lamon, 92 Ga. 529, 18 S. E. Rep. 423; Brudi v. Luhrman, 26 Ind. App. 221, 59 N. E. Rep. 409.

[3] Keene v. Dilke, 4 Ex. 388; Jones v. Alsbrook, 115 N. C. 46, 20 S. E. Rep. 170. See Winburne v. Bryan, 73 N. C. 47.

One who buys his own property which is wrongfully sold can recover only the loss sustained in doing so. If he paid more than its value that is his folly, and he can only recover the value of the articles bought. If he paid less than their value he lost no more than he paid. Sensinger v. Boyer, 153 Pa. 628, 26 Atl. Rep. 222.

If the property is bought for the plaintiff by an agent the former cannot ratify the latter's act for his own benefit, to the prejudice of the defendant's rights, by the recovery of the full value of the property. Hyde v. Kiehl, 183 Pa. 414, 38 Atl. Rep. 998.

[4] Woodham v. Gelston, 1 Johns. 134; Beadle v. Whitlock, 64 Barb. 287.

[5] Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268. In this case it was held that if return of the property is obtained by the offer and payment of a reasonable reward, this amount, with interest from the time of payment, is to be deducted from the mitigating value of the property restored. And the court say: "It is well settled that if property for which an action is brought should be returned to and received by the plaintiff it shall go in mitigation of damages. But if it become subjected to a charge after the conversion, and before it was returned; if, for example, the conversion were of a watch, which the defendant threw into a well, and the plaintiff hired a man to descend into the well and get it, the expense of reclaiming it should be deducted from the value when returned. It is the charge which regulates the damage. Murray v. Burling, 10 Johns. 176. As where one takes another's horse and leaves him at an inn, and the owner reclaims him, subject to the charge for his keeping. The damages are for the injury suffered, notwithstanding the owner has regained his property."

[6] Stevenson v. Whitesell, 10 Pa. Super. Ct. 306.

purpose, and a tortfeasor who has brought about the situation that requires the owner to do so cannot be heard to say that such consequence is not the natural and proximate result of his conduct.[1]

[481] § **1104. Mitigation of damages.** Any appropriation of the property or its proceeds by the owner after the tortious taking is equivalent to a return to the extent that he thus gets the benefit of it. Whatever such benefit, it goes in mitigation. If returned at a different place, the loss in value on that account must be compensated.[2] So if in consequence of the defendant's wrong a sale must be made, the net proceeds are deducted by way of mitigation.[3] And if the owner purchase the property at a sale made by the defendant or from his vendee at less than its value the amount paid on such purchase, instead of the value, will be considered in the estimate of damages,[4] and the application of the amount paid by him on a judgment against him will make no difference with the measure of damages, for the seizure and sale being wrongful his purchase is not a consent to such application.[5] One whose property was wrongfully taken from him replevied it; but being nonsuited in the replevin suit the statutory judgment which the defendant in that action was entitled to claim was rendered against him for the value of the property. He thereupon sued in trespass for the taking of the property; and it was held that he was entitled to recover therein not only for its detention while the defendant had it, but also its value as assessed in favor of the defendant in the replevin suit.[6] After property has been removed from the owner's possession an unaccepted offer to return it in the condition in which it was when taken does not limit the recovery to nominal damages. The owner waives nothing by standing on his legal rights.[7] This is the rule though the property has not been removed.

[1] Hughes v. Austin, 12 Tex. Civ. App. 178, 186, 33 S. W. Rep. 607.

[2] Bates v. Clark, 95 U. S. 204; Dennison v. Hyde, 6 Conn. 507.

[3] Pacific Ins. Co. v. Conard, Bald. 137; Conard v. Pacific Ins. Co., 6 Pet. 262.

[4] Sprague v. Brown, 40 Wis. 612; Parkham v. McMurray, 32 Ark. 261; Baker v. Freeman, 9 Wend. 236; Hurlburt v. Green, 41 Vt. 490; Kline v. McCandless, 139 Pa. 223, 20 Atl. Rep. 1045; Mitchell v. Corbin, 91 Ala. 599, 8 So. Rep. 810. See § 1103.

[5] Parkham v. McMurray, *supra*.

[6] Haviland v. Parker, 11 Mich. 103.

[7] Kelly v. McDonald, 39 Ark. 387.

In a recent case an attachment was levied upon goods while the owner was temporarily absent. On his return the officer in charge refused to allow him to exercise any control over them. The following day a tender of them was made to the owner, who refused to accept it. He was held to be entitled to recover the full value of the goods at the time the attachment was made.[1]

A wrong-doer cannot lessen his liability on account of any expense he has incurred in selling the property of another or in connection with it.[2] Where the property is valuable [482] for use while in the defendant's possession interest is not necessarily the compensation for the detention; the owner may recover what the use was worth; he is entitled to compensation for the value of such use.[3] If the defendant has made a profitable use of it he should not have any benefit from his own wrong, but that profit should inure to the owner.[4] The return of property, in whatever way it occurs, only goes in mitigation and no further than it operates to place the injured party in as good condition as before the trespass was committed. If the property has been injured in the taking or while in the defendant's possession, or its market value has declined, the loss falls on him.[5] If the property was wilfully taken or has suffered any injury to affect its value the plaintiff is not bound to accept it in mitigation. If the plaintiff refuses to accept the property, the defendant must preserve it so as to be continuously ready to restore it, otherwise he cannot claim in mitigation.[6] The actual damages recoverable for the death of a dog are not mitigated because he was committing a trespass at the time he was killed, and was, in the opinion of

[1] Carpenter v. Dresser, 72 Me. 377, 39 Am. Rep. 337.

[2] Lienkauf v. Morris, 66 Ala. 406; Dallam v. Fitler, 6 W. & S. 323.

In Luce v. Hoisington, 56 Vt. 436, an ox unlawfully taken was returned. The value of its use, less the expense of keeping it, measured the owner's damages.

[3] Ewing v. Blount, 20 Ala. 694; Post v. Munn, 4 N. J. L. 61, 7 Am. Dec. 570; Farrell v. Colwell, 30 N. J. L. 123; Fields v. Williams, 91 Ala. 502, 8 So. Rep. 808.

[4] Suydam v. Jenkins, 3 Sandf. 620; Beadle v. Whitlock, 64 Barb. 287.

[5] Lucas v. Trumbull, 15 Gray, 306; Ewing v. Blount, 20 Ala. 694; Perham v. Coney, 117 Mass. 102; Barrelett v. Bellgard, 71 Ill. 280; McInvoy v. Dyer, 47 Pa. 118; Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. Rep. 778; Stephenson v. Wright, 111 Ala. 579, 20 So. Rep. 622.

[6] Howell v. Caryl, 50 Mo. App. 440, 454.

the defendant, then about to kill some of his animals.[1] The title of property wrongfully taken may be shown to have been in another than the plaintiff in the action to recover for the trespass, and that it has been delivered to the owner; but this mitigates the damages merely; it does not bar the action.[2] The owner of growing crops which have been unlawfully levied upon, in consequence of which he and his children are deprived of profitable employment, is not bound to mitigate the wrong-doer's liability by seeking employment elsewhere.[3] A tenant whose dwelling has been made uncomfortable by a person not his landlord is not bound to vacate it during the the time he was liable for rent.[4]

§ 1105. Same subject; application of property to owner's benefit. The wrong-doer is entitled to no deduction from the damages for applying the property or its proceeds to the owner's benefit without his consent, unless by execution of valid legal process or authority, which process must be executed in a legal manner.[5] In that case it is said his consent is implied. It would probably be quite as correct to say that in that instance his consent is unnecessary. The law has intervened and disposed of the property; and having rightfully appropriated it to pay a debt of the owner, he has recovered satisfaction for its value and ought not again to recover the same value.[6] If after the wrongful taking the property be seized to pay the owner's tax or debt and is so applied, that application of it will inure to the benefit of the tortious taker in mitigation of [483] damages.[7] This is the general doctrine, and applies

[1] Ten Hopen v. Walker, 96 Mich. 236, 55 N. W. Rep. 657, 35 Am. St. 598.

[2] La Page v. Hill, 87 Me. 158, 32 Atl. Rep. 801.

[3] Brown v. Leath, 17 Tex. Civ. App. 262, 24 S. W. Rep. 655.

[4] Vogel v. McAuliffe, 18 R. I. 791, 31 Atl. Rep. 1.

[5] Welsh v. Wilson, 34 Minn. 92, 24 N. W. Rep. 327.

If goods are levied on as perishable, and sold as such pursuant to an order of court, the levying and selling officer is liable for only nominal damages, the goods not having been disturbed by the levy. Central Nat. Bank v. Gallagher, 163 Pa. 456, 30 Atl. Rep. 212.

[6] Street v. Sinclair, 71 Ala. 110; Bates v. Courtwright, 86 Ill. 518.

[7] Dailey v. Crowley, 5 Lans. 301; Pierce v. Benjamin, 14 Pick. 356; Lucas v. Trumbull, 15 Gray, 306; Delano v. Curtis, 7 Allen, 470; Perham v. Coney, 117 Mass. 102; Perkins v. Freeman, 26 Ill. 477; Hallett v. Novion, 14 Johns. 273; Cook v. Hartle, 8 C. & P. 568; Curtis v. Ward, 20 Conn. 204; Burn v. Morris, 2 Cr. & M. 579; Hepburn v. Sewell, 5 Har. & J. 211; Doolittle v. McCullough, 7 Ohio St. 299; Cook v. Loomis, 26

whether the process on which the property is disposed of is for the satisfaction of a debt due the wrong-doer himself or a third person. It also applies where the taking is wrongful but becomes void because of irregularity in the subsequent proceedings.[1] An important exception is made in New York, Michigan, and, perhaps, in Maryland. The wrong-doer cannot there, as the law is also in England, avail himself by way of mitigation of damages of any appropriation to the owner's benefit by seizure under legal process or otherwise without his consent, where the process or appropriation is procured for the wrong-doer's benefit or for his debt, or by his agency or procurement for the debt of any other person.[2]

§ 1106. Damages against trespasser from the beginning. Void process or any legal authority abused in the taking or subsequent treatment of property will not only afford no justification to the party acting under it, but he will be precluded, according to some courts, by his wrongful action from setting up any application of the property or money so obtained to the owner's benefit, without his consent, by way of mitigation of damages. Thus, in trespass for taking goods under process upon a regular judgment, but in a place to which the process did not run, the owner was permitted to recover the whole value, and not merely the damage sustained by the taking in a wrong place.[3] In another case the defendant, who was landlord to the plaintiff, had, in order to make a distress, forcibly and illegally entered the demised premises and there seized the latter's goods. It was held that the plaintiff was entitled to recover the full value, and not that value minus the rent.[4]

Conn. 483; Sprague v. Brown, 40 Wis. 612; Johannesson v. Borschsenius, 35 Wis. 131; Cooper v. Newman, 45 N. H. 339; Stewart v. Martin, 16 Vt. 397; Montgomery v. Wilson, 48 Vt. 616; Clark v. Bates, 1 Dak. 40, 46 N. W. Rep. 510; Block v. Sweeney, 63 Tex. 419; Mississippi Mills v. Meyer, 83 Tex. 433, 18 S. W. Rep. 748, quoting the text; Grisham v. Bodman, 111 Ala. 194, 20 So. Rep. 514.

[1] Cressey v. Parks, 76 Me. 532; Pierce v. Benjamin, 14 Pick. 356. But it is otherwise in Vermont. Hall v. Ray, 40 Vt. 576, 94 Am. Dec. 440.

[2] Wehle v. Butler, 61 N. Y. 245; Ball v. Liney, 48 id. 6, 8 Am. Rep. 511; Otis v. Jones, 21 Wend. 394; Sherry v. Schuyler, 2 Hill, 204; Higgins v. Whitney, 24 Wend. 379; Wanamaker v. Bowes, 36 Md. 42. See Edmondson v. Nuttall, 17 C. B. (N. S.) 280; Swire v. Leach, 18 id. 479; §§ 1138–1141.

[3] Sowell v. Champion, 6 Ad. & E. 407.

[4] Attack v. Bramwell, 3 B. & S.

Cockburn, C. J., said: "It must be taken that if a man under color of legal authority, as in the case of distress for rent, does that which makes him a trespasser *ab initio* he is in the same position as a stranger who, without any legal authority whatever, breaks into a house and seizes the goods of another. [484] . . . The defendant has taken the plaintiff's goods, it may be under color of legal authority, but in point of law he has taken them, not under a distress, but under a trespass, and it does not lie in his mouth to say that by taking them and appropriating a part of them in satisfaction of his rent he has *pro tanto* done good to the plaintiff. The man whose premises are broken into and whose goods have been seized has a right to say, 'Let me be put into the position in which I stood before your illegal act. I will not accept at your hands the benefit you say you have done me by it.'" Crompton, J., was of the same opinion, and thus declared his view: "A landlord has by law the special privilege of paying himself his rent by seizing his tenant's goods; and where he takes that proceeding in a way not authorized he becomes a trespasser from the beginning; all the acts he does are trespasses; he is a trespasser, not only in entering, but in seizing and disposing of the goods taken, and the ordinary rule is that the injured party shall recover the full value. . . . This case is a bare tort, under color of which the defendant has helped himself to the plaintiff's goods, and he has no more right to put against their value the rent due to him than he would to put any other debt. The interest of the tenant was the real value of the goods; the plaintiff had no real charge or lien upon them; and therefore that value was the measure of damages."[1]

520; Keen v. Priest, 4 H. & N. 236; Crowley v. Apted, 14 N. S. W. L. R. 146.

[1] White v. Binstead, 13 C. B. 303, 76 Eng. C. L. 303; Gillard v. Brittan, 8 M. & W. 575. Compare Chinnery v. Viall, 5 H. & N. 288; Mickles v. Miles, 1 Grant, 320.

As to what is such an abuse of process as will make one a trespasser from the beginning, see note to Barrett v. White, 11 Am. Dec. 365.

An officer who has acted under regular process in seizing property will not by reason of his disposition or management of it before sale become a trespasser from the beginning unless he commits a substantial violation of the legal rights of a party in such a way as to show a gross or wanton disregard of duty. Ladd v. Newell, 34 Minn. 107, 24 N. W. Rep. 366; Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; Barrett v. White, 3 N. H. 210, 14 Am. Dec. 352.

§ 1107. Same subject. If a defendant is a trespasser from the beginning his defense wholly fails, and he is liable for the same sum in damages which he would be compelled to pay if he had gone on without any precept or pretense of authority and done all the acts proved upon him.[1] But an abuse of process only subjects to a loss of the protection of that particular process and of the rights depending on it. If property is [485] lawfully attached no abuse of execution will make the officer chargeable as a trespasser in making the attachment; and hence the damages would be assessed on the basis of the attached property being subject to the lien.[2] So when a landlord who had a right to distrain growing crops made such a distraint, but subsequently illegally sold them, and they were harvested and taken away by the purchaser, his illegal act of sale did not affect his lien, and as no actual damage resulted from the sale and harvesting the tenant was only entitled to nominal damages.[3] If the abuse of authority or process is only an excess as to a separable part of the action under it, the person who so acts will be a trespasser from the beginning only as to that part. Where the defendant drew beer out of one of several barrels that he had taken he was a trespasser only as to that barrel.[4] And where six looms were inventoried with other property in a distress for rent and the defendant had no authority to take them, it was held that taking them did not affect his authority in respect to the other property.[5]

A trespasser may also show in mitigation of the damages that the plaintiff was not the owner of the property taken, and that after the taking it was reclaimed by the true owner or has been taken on legal process against him;[6] also, that since the taking the right of the plaintiff in the property has ceased.[7]

[1] Per Green, J., Barrett v. White, *supra*.

[2] Heald v. Sargeant, 15 Vt. 506, 40 Am. Dec. 694. See Van Brunt v. Schenck, 11 Johns. 377; Osgood v. Carver, 43 Conn. 24.

[3] Proudlove v. Twemlow, 1 Cr. & M. 326.

[4] Dod v. Monger, 6 Mod. 215.

[5] Harvey v. Pocock, 11 M. & W. 740; Keen v. Priest, 4 H. & N. 236; Rowley v. Rice, 11 Met. 337.

[6] Squire v. Hollenbeck, 9 Pick. 551, 20 Am. Dec. 506; Hanson v. Herrick, 100 Mass. 323.

[7] Id.; Perry v. Chandler, 2 Cush. 237; Borlander v. Gentry, 36 Cal. 110, 95 Am. Dec. 162; Wanamaker v. Bowes, 36 Md. 42; Brewer v. Dew, 11 M. & W. 625; Criner v. Pike, 2 Head, 398.

The facts and circumstances attending the trespass, as has already been stated, may always be proved, that the jury may understand its intrinsic character; to enable the plaintiff to show aggravations and bad motive; and to enable the defendant to controvert these; but the defendant, if guilty of the trespass, is bound to make reparation for the actual injury. Absence of bad motive and of all aggravations cannot relieve him from making full compensation for property taken, de- [486] stroyed or injured.[1] An admission of counsel on the trial of an action of trespass that the defendant acted without malice will preclude the plaintiff from claiming vindictive damages; and therefore evidence on the part of the defendant in the nature of justification of his tortious act is inadmissible by way of mitigation.[2] Evidence in respect to the motive by which the defendant was influenced is only material on his part when it is introduced to repel an attempt by the plaintiff to recover exemplary damages.[3]

[1] Harker v. Dement, 9 Gill, 7.
[2] Hoyt v. Gelston, 13 Johns. 141, 561.
[3] McCombie v. Davies, 6 East, 538.

CHAPTER XXVIII.

CONVERSION.

§ 1108. The action of trover.
1109, 1110. The general rule of damages.
1111. Other rules of damages.
1112. Time of conversion.
1113. Proof of value.
1114. Same subject; fixtures.
1115. Interest.
1116. Recovery for property subject to sale.
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1120. Same subject; conflict in New York cases.
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1125. Departure from the general rule sometimes justifiable.
1126–1128. Recovery where value of property enhanced by defendant.
1129. Special or consequential damages.
1130. Attorney's fees.
1131. Exemplary damages.
1132. Conversion of money securities.
1133. Conversion of insurance policies.
1134. Conversion of deeds, etc.
1135. Conversion of shares of stock.
1136, 1137. Recovery limited to plaintiff's interest.
1138–1141. Mitigation of damages.
1142. Plaintiff's duty to mitigate damages.

§ 1108. The action of trover. The common-law ac- [487]
tion of trover may be brought against any person who has had in his possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner, or refused to deliver it when demanded.[1] The injury is done by the conversion and by depriving the plaintiff

[1] Where the conversion consists of the wrongful assumption of dominion over the property of another in subversion and denial of his rights, the right of action is complete without making a demand. Boutwell v. Parker, 124 Ala. 341, 27 So. Rep. 309.

of his property; that is the gist of the action; the statement of the finding or trover is now immaterial and not traversable; the fact of conversion does not necessarily import an acquisition of property by the defendant.[1] Lord Mansfield thus defined the action: "In *form* it (i. e., the trover) is a fiction; in *substance* it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it; and if he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *malificium*, and to entitle the plaintiff to recover two things are necessary: first, property in the plaintiff; secondly, a wrongful conversion by the defendant."[2]

The action lies only for property of a personal nature; not only that which is tangible, but all property of that nature which may be converted; as for paper representatives of value, [488] choses in action and corporate stock.[3] It is based upon title; the plaintiff must be the general owner or have some special property in the subject of the action; he must have also the actual, or a right to its present, possession at the time of the conversion.[4] The general rule is that one of two tenants

[1] 1 Chitty, Pl. 146.

[2] Id.; Cooper v. Chitty, 1 Burr. 31.

[3] Ayres v. French, 41 Conn. 151; Payne v. Elliot, 54 Cal. 341, 35 Am. Rep. 80; McAllister v. Kuhn, 96 U. S. 87, 1 Utah, 273.

The propriety of this form of action for the conversion of shares of stock is denied only in Pennsylvania. Cook on Stock, etc. (5th ed.), § 576. And there it lies for the conversion of certificates of stock. Sewall v. Lancaster Bank, 17 S. & R. 285; Neiler v. Kelley, 69 Pa. 403.

[4] Smith v. Plomer, 15 East, 607; Fairbank v. Phelps, 22 Pick. 535; Burton v. Tannehill, 6 Blackf. 470; Caldwell v. Cowan, 9 Yerg. 262; Lewis v. Mobley, 4 Dev. & Batt. 323, 34 Am. Dec. 379; Grant v. King, 14 Vt. 367; Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271; Curd v. Wunder, 5 Ohio St. 92; Thayer v. Hutchinson, 13 Vt. 507, 37 Am. Dec. 607; 2 Greenlf. Ev., § 640; Kennett v. Peters, 54 Kan. 119, 37 Pac. Rep. 999, 45 Am. St. 274; Hodge v. Eastern R. Co., 70 Minn. 193, 72 N. W. Rep. 1074; Latusek v. Davies, 79 Minn. 279, 82 N. W. Rep. 857; London v. Miller, 19 Tex. Civ. App. 446, 47 S. W. Rep. 734, quoting the text; Wright v. Skinner, 34 Fla. 453, 16 So. Rep. 335.

This rule may be varied by an admitted usage among men engaged in a certain occupation. Thus, Judge Lowell held that where a boat's crew from a whale ship pursued and struck a whale in the Arctic ocean, and the harpoon, with the line attached to it, remained in the whale, but became disconnected from the boat, that title to the whale vested in such crew, though the crew from an-

in common cannot maintain trover unless the possession of the co-owner results in the destruction of the property or such a hostile appropriation of it as to exclude, destroy or ignore the rights of the other tenant therein.[1] But the rule has no application where the property held in common is alike in quality and value, and divisible by weight, tale or measure if the tenant in possession refuses to divide it or converts it to his own use.[2] By recovery of the value and satisfaction of the judgment the title is transferred to the defendant as of the date of the conversion.[3]

other ship pursued and captured the whale. The rights of the first-mentioned crew were promptly asserted. Swift v. Gifford, 2 Low. 100; Ghen v. Rich, 8 Fed. Rep. 159 (sustaining a custom prevailing in the eastern part of Massachusetts Bay).

If a whale is killed and left with unequivocal marks of appropriation, and all is done that is practicable under the circumstances, the possession is sufficient. Taber v. Jenny, 1 Sprague, 315.

A carrier which has converted property delivered to it for transportation cannot require the tender or payment of charges as a condition of maintaining an action against it. Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. Rep. 476, 34 Am. St. 579.

A lien upon property, or a mere right to charge it under a statute, will not support trover; the plaintiff must have title, general or special, to the property. Jordan v. Lindsay, 132 Ala. 567, 31 So. Rep. 484, overruling Gardner v. Head, 108 Ala. 619, 18 So. Rep. 551, and Ragsdale v. Kinney, 119 Ala. 454, 24 So. Rep. 443.

The brood of all tame and domestic animals belongs to the owner of the dam; hence where cattle are converted their owner may recover the value of their increase in existence at the time of the demand and conversion. Arkansas Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 24 Fed. Rep. 261.

A petition brought in the name of one who was agent for the owner of the chattels, but who had no general or special property therein, cannot be changed so as to be in the name of the plaintiff for the use of the owner. Mitchell v. Georgia & A. R. Co., 111 Ga. 760, 36 S. E. Rep. 976.

[1] Osborn v. Schenck, 83 N. Y. 201; Hudson v. Swan, id. 552.

[2] Gates v. Bowers, 169 N. Y. 14, 88 Am. St. 530, 61 N. E. Rep. 993.

[3] Morris v. Robinson, 3 B. & C. 196; Hepburn v. Sewell, 5 Har. & J. 211, 9 Am. Dec. 512; Arnold v. Kelly, 4 W. Va. 642; Osterhout v. Roberts, 8 Cow. 43; Stirling v. Garritee, 18 Md. 468; Wright v. Walker, Mart. & Hayw. 167; Brinsmead v. Harrison, L. R. 6 C. P. 584; Johnson v. Dun, 75 Minn. 533, 538, 78 N. W. Rep. 98.

Some cases in Maine have laid down the rule that the recovery of judgment vested title in the wrongdoer, but it is said that the overwhelming weight of authority overrules them and declares that nothing short of a satisfaction of the judgment transfers the title. Jones v. Cobb, 84 Me. 153, 24 Atl. Rep. 798, citing Murray v. Lovejoy, 2 Cliff. 191.

Settling a trespass committed by cutting trees does not transfer the title to the trees cut. Betts v. Church, 5 Johns. 348.

§ 1109. The general rule of damages. The general rule of damages in England and in this country is the market value of the property at the time and place of conversion, if it had such value; and in America, at least, interest is generally added as matter of law.[1] This rule is based on the as-

[1] Dolliff v. Robbins, 83 Minn. 498, 86 N. W. Rep. 772; State ex rel. v. Fidelity & Deposit Co., 94 Mo. App. 184; Woods v. Nichols, 22 R. I. 225, 47 Atl. Rep. 211; Zindorf v. Western American Co., 26 Wash. 695, 67 Pac. Rep. 355; Robinson v. Hartridge, 13 Fla. 501; Spencer v. Vance, 57 Mo. 427; Cole v. Ross, 9 B. Mon. 393, 50 Am. Dec. 517; Silva v. Homen, 9 Hawaiia, 14; Gerkins v. Kentucky Salt Co., 23 Ky. L. Rep. 2415, 67 S. W. Rep. 821; Briscoe v. McElween, 43 Miss. 556; Dixon v. Caldwell, 15 Ohio St. 412, 86 Am. Dec. 487; Fowler v. Merrill, 11 How. 375; Watt v. Potter, 2 Mason, 77; Bourne v. Ashley, 1 Low. 27; Jones v. Allen, 1 Head, 626; Allen v. Dykers, 3 Hill, 593; Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 498; Moore v. Aldrich, 25 Tex. Sup. 276; Ripley v. Davis, 15 Mich. 75, 90 Am. Dec. 262; Final v. Backus, 18 Mich. 218; Barry v. Bennett, 7 Met. 354; Falk v. Fletcher, 18 C. B. (N. S.) 403; Selkirk v. Cobb, 13 Gray, 313; Agnew v. Johnson, 22 Pa. 471, 62 Am. Dec. 303; Phillips v. Speyers, 49 N. Y. 653; Tyng v. Commercial Warehouse Co., 58 id. 308; Andrews v. Durant, 18 id. 496; Ormsby v. Vermont Copper Mining Co., 56 id. 623; Douglass v. Kraft, 9 Cal. 562; Yater v. Mullen, 24 Ind. 277; Dillenback v. Jerome, 7 Cow. 298; Rensselaer Glass Factory Co. v. Reid, 5 Cow. 587; Dennis v. Barber, 6 S. & R. 420; Hurd v. Hubbell, 26 Conn. 389; Cook v. Loomis, id. 483; Lyon v. Gormly, 53 Pa. 261; Stirling v. Garritee, 18 Md. 468; O'Meara v. North American Mining Co., 2 Nev. 112; Carlyon v. Lannan, 4 Nev. 156; Boylan v. Huguet, 8 Nev. 345; Homer v. Hathaway, 33 Cal. 117; Page v. Fowler, 39 id. 412, 2 Am. Rep. 462; Riley v. Martin, 35 Ga. 136; Grant v. King, 14 Vt. 367; Crumb v. Oaks, 38 id. 566; Kennedy v. Strong, 14 Johns. 128; Ryburn v. Pryor, 14 Ark. 505; Hatcher v. Pelham, 31 Tex. 201; Jenkins v. McConico, 26 Ala. 213; Robinson v. Barrows, 48 Me. 186; Sanders v. Vance, 7 T. B. Mon. 209, 18 Am. Dec. 167; Clark v. Whitaker, 19 Conn. 319, 48 Am. Dec. 160; Linville v. Black, 5 Dana, 177; Commercial Bank v. Jones, 18 Tex. 811; Davis v. Fairclough, 63 Mo. 61; Daniel v. Holland, 4 J. J. Marsh. 26; King v. Ham, 6 Allen, 298; Lillard v. Whitaker, 3 Bibb, 92; Scull v. Briddle, 2 Wash. C. C. 150; Williams v. Crum, 27 Ala. 468; Kennedy v. Whitwell, 4 Pick. 466; Linam v. Reeves, 68 Ala. 89; Jones v. Horn, 51 Ark. 19, 9 S. W. Rep. 309, 14 Am. St. 17; Brasher v. Holtz, 12 Colo. 201, 20 Pac. Rep. 616; Ford v. Roberts, 14 Colo. 291, 23 Pac. Rep. 322; Skinner v. Pinney, 19 Fla. 42, 45 Am. Rep. 1; Brewster v. Van Liew, 119 Ill. 554, 59 Am. Rep. 823, 8 N. E. Rep. 842; First Nat. Bank v. Strong, 28 Ill. App. 325, 338; Vancleave v. Beach, 110 Ind. 269, 11 N. E. Rep. 228; Thew v. Miller, 73 Iowa, 742, 36 N. W. Rep. 771; Simpson v. Alexander, 35 Kan. 225, 11 Pac. Rep. 171; Chamberlain v. Worrell, 38 La. Ann. 347; First Nat. Bank v. Boyce, 78 Ky. 42, 39 Am. Rep. 198; Hopper v. Haines, 71 Md. 64, 18 Atl. Rep. 29, 20 id. 159; Forbes v. Boston & L. R. 133 Mass. 154; Brown v. Murdock, 140 id. 314, 3 N. E. Rep. 208; Jellett v. St. Paul, etc. R. Co., 30 Minn. 265, 15 N. W. Rep. 237; Black v. Robinson, 62 Miss. 68; Nance v. Metcalf,

sumption that such value is beneficially equal to the property itself, and that interest compensates for the delay in payment of that value.[1] This assumption is more particularly [489] true where the property converted is marketable goods and commodities which can be readily bought and sold at prices

19 Mo. App. 183; Barlass v. Braash, 27 Neb. 212, 42 N. W. Rep. 1028; Beede v. Lamprey, 64 N. H. 510, 15 Atl. Rep. 133, 10 Am. St. 426; Railroad Co. v. Hutchins, 37 Ohio St. 282; Blum v. Merchant, 58 Tex. 400; Miller v. Jannett, 63 id. 82; Crampton v. Valido Marble Co., 60 Vt. 291, 15 Atl. Rep. 153, 1 L. R. A. 120; Arkansas Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. Rep. 458; Ghen v. Rich, 8 Fed. Rep. 159; Neiswanger v. Squier, 73 Mo. 192; Ingram v. Rankin, 47 Wis. 406, 2 N. W. Rep. 755, 32 Am. Rep. 762; Perkins v. Marrs, 15 Colo. 262, 25 Pac. Rep. 168; United States v. Pine River Logging & Imp. Co., 89 Fed. Rep. 907, 32 C. C. A. 406; Hanlon v. O'Keefe, 55 Mo. App. 528; Hannan v. Connett, 10 Colo. App. 171, 50 Pac. Rep. 214; Sutton v. Dana, 15 Colo. 98, 25 Pac. Rep. 90; Sylvester v. Craig, 18 Colo. 44, 31 Pac. Rep. 387; Wright v. Skinner, 34 Fla. 453, 16 So. Rep. 335, citing the text; Cassidy v. Elk Grove Land & Cattle Co., 58 Ill. App. 39; Neeb v. McMillan, 98 Iowa, 718, 68 N. W. Rep. 438; Gensburg v. Marshall Field & Co., 104 Iowa, 599, 74 N. W. Rep. 3; Wing v. Milliken, 91 Me. 387, 40 Atl. Rep. 138, 64 Am. St. 238; Noyes v. Stone, 163 Mass. 490, 40 N. E. Rep. 856; Thomas Manuf. Co. v. Huff, 62 Mo. App. 124; Baum Iron Co. v. Union Savings Bank, 50 Neb. 387, 69 N. W. Rep. 939; Maul v. Drexel, 55 Neb. 446, 76 N. W. Rep. 163; Brooks v. Rogers, 101 Ala. 111, 13 So. Rep. 386; Perkins v. Ewan, 66 Ark. 175, 49 S. W. Rep. 569; Summers v. Heard, 66 Ark. 550, 50 S. W. Rep. 78, 51 id. 1057; Craufurd v. Smith, 93 Va. 623, 23 S. E. Rep. 235; Fleischmann v. Samuel, 18 App. Div. 97, 45 N. Y. Supp. 404; Robinson v. Peru Plow & Wheel Co., 1 Okl. 140, 31 Pac. Rep. 988; Drennen v. Charles, 12 Pa. Super. Ct. 476; Blood v. Erie Dime Savings & Loan Co., 164 Pa. 95, 30 Atl. Rep. 362; Woods v. Nichols, 21 R. I. 537, 45 Atl. Rep. 548, 48 L. R. A. 773; Gillespie v. Evans, 10 S. D. 234, 72 N. W. Rep. 576; Norwood v. Interstate Nat. Bank, 92 Tex. 268, 48 S. W. Rep. 3; Gresham v. Island City Savings Bank, 2 Tex. Civ. App. 52, 21 S. W. Rep. 556; Casey v. Chaytor, 5 Tex. Civ. App. 385, 23 S. W. Rep. 1114; Hull v. Davidson, 6 Tex. Civ. App. 588, 25 S. W. Rep. 1047; La Chapelle v. Warehouse & Builders' Supply Co., 95 Wis. 518, 70 N. W. Rep. 589; Henderson v. Williams, [1895] 1 Q. B. 521; Davey v. Bank of New South Wales, 9 Vict. L. R. (law) 252; Haddow v. Duke Co., 18 id. 155; Hoyt v. Fuller, 104 Fed. Rep. 192, 43 C. C. A. 466, citing the text; Downing v. Outerbridge, 79 Fed. Rep. 931, 25 C. C. A. 244; Hand v. Scodeletti, 128 Cal. 674, 61 Pac. Rep. 373. See § 1115 as to interest.

[1] Ewing v. Blount, 20 Ala. 694; Simpson v. Alexander, 35 Kan. 225, 11 Pac. Rep. 171; Lack v. Brecht, 166 Mo. 242, 65 S. W. Rep. 976 (compare Meyer v. Phœnix Ins. Co., 69 S. W. Rep. 639, 95 Mo. App. 721, which decides that interest is not recoverable as a matter of right); Cutler v. James Goold Co., 43 Hun, 516. See Shepard v. Pratt, 16 Kan. 209, as to the rule of pleading which warrants the recovery of interest.

that are easily ascertained and which are subject to but slight fluctuations.[1] If there were no fluctuations it would be immaterial to the equivalence of compensation when the value is taken, except as to interest. But there is a logical as well as a legal relation between the conversion and the assessment of value to require them to be coincident; a natural connection between the wrong done and the retributive or compensatory assessment of damages; therefore the value should be ascertained at the time of the conversion. This rule was applied where coin was converted at a time when legal tender notes were far below par; the wrong-doer was answerable in damages for the amount he realized by its sale.[2] The plaintiff's recovery was thus larger than it would have been in an action for money had and received, because if the coin had been regarded as merchandise such an action could not be maintained; if as money, it was so many dollars and no more.[3] The general rule of damages stated applies where an agent unauthorizedly sells property to himself at the price he was empowered to sell to a third person. The election of the principal to sue the agent on the implied contract of purchase is not a ratification of the latter's act in purchasing so as to limit the recovery to the price at which he was authorized to sell.[4] The fact that the goods converted were sold under a mortgage, which provided for their sale, does not entitle the wrong-doer to lessen his liability for their value by deducting the expenses of the sale. The value of the goods was that sum of money for which they could be exchanged or sold in bulk, and the owner is not entitled to less because the sale was made at retail; it might be otherwise if he sought to recover the retail price of the goods.[5] The plaintiff cannot recover the value of the property to him, if that was other than its general value.[6] The value of the converted property is not always determined by its value at the place where the wrong was done. Where a carrier converted coal consigned to the

[1] Bank v. Reese, 26 Pa. 143.

[2] Bank v. Burton, 27 Ind. 426; Coffey v. National Bank, 46 Mo. 140, 2 Am. Rep. 488.

[3] Frothingham v. Morse, 45 N. H. 545.

[4] Anderson v. First Nat. Bank, 5 N. D. 451, 67 N. W. Rep. 821.

[5] Perkins v. Ewan, 66 Ark. 175, 49 S. W. Rep. 569.

[6] Endel v. Norris, 15 Tex. Civ. App. 140, 39 S. W. Rep. 608. See § 1113.

plaintiff the recovery was measured by its value at the place to which it was consigned, less cost of transportation, if the plaintiff was liable therefor.[1]

§ 1110. Same subject. The conversion may occur, first, by a wrongful taking; second, by a wrongful use or appropriation after obtaining possession lawfully; and third, by a wrongful detention. To be a certain legal measure of damages it should be applied inflexibly to the first act of conversion, especially if there be no subsequent pursuit of the property or assertion of right to it in specie. No change of the property by the wrong-doer should suffice to give the owner a new cause of action, or a new date for the valuation of the property.[2] After conversion a sale by the defendant at [490] a price greater than the value at the time thereof should not change the rule; and it has been held that it does not.[3] And it is equally the rule to take the price at the time of the conversion when there is a subsequent decline in the value.[4] It was formerly the rule in Texas that the value of the property

[1] Blackmer v. Cleveland, etc. R. Co., — Mo. App. —, 73 S. W. Rep. 913.

[2] See Baltimore M. Ins. Co. v. Dalrymple, 25 Md. 269; Dows v. National Bank, 91 U. S. 618; Tome v. Dubois, 6 Wall. 548; Newman v. Kane, 9 Nev. 234; Foote v. Merrill, 54 N. H. 490; O'Meara v. North American Mining Co., 2 Nev. 112; Robinson v. Barrows, 48 Me. 186.

A departure from this rule has been coincident with or the occasion of the conflict of decision relative to the measure of damages. See Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189; Final v. Backus, 18 Mich. 218. In the latter case trover was brought for saw logs cut from timber on the plaintiff's land, and transported to another county where they were sawed into lumber. Cooley, C. J., said: "The actual change in the character of the property appears to have taken place when they were manufactured into lumber there; and although the owner of the land from which they were taken might have treated their removal from the land as a conversion, he was not compellable to do so; but might have followed the logs and reclaimed them at Saginaw. This being so, the plaintiff had a right to treat the time of the manufacture of the logs into lumber as the period of conversion, and to recover their value accordingly." This reasoning favors the recovery of an intermediate value, and without restriction of time, if the wrong-doer changes the property or from time to time exercises some new dominion over it which alone would suffice to constitute a conversion.

[3] Kennedy v. Whitwell, 4 Pick. 466; Baker v. Wheeler, 8 Wend. 508; Whitehouse v. Atkinson, 3 C. & P. 344.

[4] Devlin v. Pike, 5 Daly, 85; Washburn v. Carthage Nat. Bank, 86 Hun, 396, 33 N. Y. Supp. 505, affirmed without opinion, 155 N. Y. 690.

is the measure of damages though the owner purchased it at a sale made after the conversion.[1] This question came under review in one of the courts of civil appeals, with the result that the rule stated, after a full examination of the authorities, was considered erroneous.[2] This view was approved by the supreme court, which overruled the cases to the contrary, saying that no others could be found which were in harmony with them; that the recovery could not exceed the sum paid for the goods, with interest and such special damages as accrued by depreciation in value while they were withheld.[3]

In some cases the measure of the owner's recovery against an innocent purchaser from a wilful wrong-doer is the value of the property at the time and place it came into the defendant's possession, and not its value where it was at the time he contracted for it.[4] The supreme court of the United States holds that where timber is cut and removed from government land the damages are to be assessed as against a wilful trespasser at the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor or expense; as against an unintentional or mistaken wrong-doer, or his innocent vendee, the value at the time of the conversion, less the value added to the property; as against a purchaser without notice of wrong from an intentional trespasser, the value at the time he purchased.[5] This doctrine has been approved in Florida with the modification that if the trespasser is an unintentional or mistaken one, the value of the

[1] Schooler v. Hutchings, 66 Tex. 324; Hart v. Blum, 76 Tex. 113, 13 S. W. Rep. 181; Casey v. Chator, 5 Tex. Civ. App. 385, 23 S. W. Rep. 1114.

[2] Field v. Munster, 11 Tex. Civ. App. 341, 32 S. W. Rep. 417, citing Dodson v. Cooper, 37 Kan. 346, 15 Pac. Rep. 200; Baldwin v. Porter, 12 Conn. 473; Hunt v. Haskell, 24 Me. 339, 41 Am. Dec. 387; Sprague v. Brown, 40 Wis. 620 (the latter case cites Ford v. Williams, 24 N. Y. 359; Murray v. Burling, 10 Johns. 172; Baker v. Freeman, 9 Wend. 36, 24 Am. Dec. 117; Hurlburt v. Green, 41 Vt. 490; McInvoy v. Dyer, 47 Pa. 118); Tilton v. Fuller, 35 N. H. 226; Long v. Lamkin, 9 Cush. 361; Brady v. Whitney, 24 Mich. 154.

[3] Muenster v. Fields, 89 Tex. 102, 33 S. W. Rep. 852. To the same effect are Kline v. McCandless, 139 Pa. 223, 20 Atl. Rep. 1045; Fields v. Williams, 8 So. Rep. 808 (Ala.).

[4] Hoxsie v. Empire Lumber Co., 41 Minn. 548, 43 N. W. Rep. 476; Glaspy v. Cabot, 135 Mass. 435. *Contra*, Railroad Co. v. Hutchins, 37 Ohio St. 282.

[5] Wooden-ware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. Rep. 398; Golden Reward Mining Co. v. Buxton Mining Co., 97 Fed. Rep. 413, 38 C. C. A. 228.

property at the time and place of its conversion should measure his liability.[1] A landlord who converts a building erected on his premises by a tenant by refusing to permit him to remove it in accordance with a covenant to that effect is liable for its value to the extent that it enhances the worth of the land on which it stands.[2] If part of an article is converted the owner is not entitled to recover its entire value because the abstraction of the part renders the article useless for the purpose for which it was intended. In order that there may be such a measure of recovery the part left must be rendered valueless for any purpose whatever.[3] The dividends due on converted stock cannot be recovered in the action for the conversion if they became due afterward;[4] but dividends earned prior to the conversion, with interest on them, may be recovered.[5]

§ 1111. Other rules of damages. As we shall presently see, the principle stated in the preceding sections is not always applied, the main exceptions being as to property which fluctuates more in value than property usually does. There are a few cases which allow a more flexible standard of compensation than the value of property at the time of its conversion, and this without apparent reference to the nature of the property. Thus in South Carolina the jury may give the highest value of the property up to the time of trial[6] with interest, or allow for its hire from the time of the conversion as may be most beneficial to the plaintiff.[7] The allowance of this measure is discretionary with the jury.[8] In Alabama the measure of recovery is the value at conversion or at any time subsequent thereto, with interest.[9] "The reason for allowing the jury to assess damages according to the increased value is to prevent any benefit to the defendant from his wrongful act.

[1] Wright v. Skinner, 34 Fla. 453, 463, 16 So. Rep. 335.

[2] Neiswanger v. Squier, 73 Mo. 192; Deisher v. Gehre, 45 Kan. 583, 26 Pac. Rep. 3.

[3] Walker v. Johnson, 28 Minn. 147, 9 N. W. Rep. 632. See Northern Transportation Co. v. Sellick, 52 Ill. 249, 252.

[4] Ralston v. Bank of California, 112 Cal. 208, 44 Pac. Rep. 476; Citizens' Street R. Co. v. Robbins, 144 Ind. 671, 24 N. E. Rep. 916.

[5] Citizens' Street R. Co. v. Robbins, *supra*.

[6] Kid v. Mitchell, 1 Nott & McC. 334, 9 Am. Dec. 702; Carter v. Du Pre, 18 S. C. 179.

[7] Burney v. Pledger, 3 Rich. 191.

[8] Harley v. Platts, 6 Rich. 318.

[9] Curry v. Wilson, 48 Ala. 638; Sharpe v. Barney, 114 Ala. 361, 21 So. Rep. 490.

Where there has been no return of the property or other special defense in reduction of damages, the discretion allowed the jury in such case does not extend to taking a lower value than that applying at the time of the conversion."[1] In North Dakota the code provides for the recovery of the highest market value at any time between that of the conversion and the verdict, if the action has been prosecuted with reasonable diligence.[2] In South Dakota the measure is fixed by statute as the value of the property at the time of the conversion, with interest; or, where the action has been prosecuted with reasonable diligence, the highest market value intermediate the conversion and the verdict, without interest, at the option of the plaintiff. This provision is binding upon the federal courts in the state, and applies to an action for trespass upon a mining claim, the only demand being for the damage done by the removal of ore from the mine and the conversion thereof, the action being in effect, though not in form, for the conversion of personal property.[3] Under the Georgia code, if the plaintiff elects to take a money verdict, he is entitled to the highest price proven as the value of the property at any time before the trial or the value of the property at the time of the conversion, with interest from that date.[4]

A comparatively recent Wisconsin case disapproved an instruction which allowed the recovery of the highest market price intermediate the conversion and the trial. The court said it would adhere to the general rule it had laid down, and hold that, in all actions, either upon contract for the non-delivery of goods, or for their tortious taking or conversion, unless the plaintiff is deprived of some special use of the property anticipated by the wrong-doer, or the facts warrant the imposition of exemplary damages, the recovery must be measured by the value of the property at the time and place when and where it should have been delivered, or of the wrongful taking or conversion, with interest on that sum to

[1] Boutwell v. Parker, 124 Ala. 341, 27 So. Rep. 309, citing Burks v. Hubbard, 69 Ala. 379.

[2] First Nat. Bank v. Red River Valley Nat. Bank, 9 N. D. 319, 83 N. W. Rep. 221.

[3] Golden Reward Mining Co. v. Buxton Mining Co., 97 Fed. Rep. 413, 38 C. C. A. 228.

[4] Mashburn v. Dannenberg, — Ga. —, 44 S. E. Rep. 97.

the date of the trial; but if it appears that the defendant in either such case has sold the property, the plaintiff may elect to recover the amount for which the sale was made, with interest thereon for such time, and if it appears that the property is in the possession of the defendant at the time of the trial, the plaintiff may elect to recover its present value at the place where it was taken or converted in the form it was then in.[1] In Washington, if a sale of the goods attached has been negotiated prior to the levy and the latter prevented the completion of the contract, the damages are measured by the contract price, and not by the value of the goods.[2] The same rule was applied where purchases of the principal's property had been made from an agent as if it were the latter's.[3]

§ 1112. Time of conversion. The general rule is that a conversion occurs when a rightful demand for the possession of property is made and not complied with.[4] If it has been borrowed the borrower is in default after his failure to return it at the agreed time.[5] If a bailee becomes dispossessed of property through negligence his liability attaches as of the time it is lost, and not at the time of demand.[6] Where a broker failed to deliver stocks which his principal had paid for and which were charged against him as delivered on specified dates the conversion was held to have occurred at such dates.[7] If property is seized on judicial process and subsequently sold the sale constitutes the time of the conversion.[8] If possession is not disturbed when process is served the rights of the parties are determined as of the time the owner is dispossessed.[9] A cor-

[1] Ingram v. Rankin, 47 Wis. 406, 420, 2 N. W. Rep. 755, 32 Am. Rep. 762. See §§ 1118–1125.

[2] Curry v. Catlin, 12 Wash. 322, 41 Pac. Rep. 55. See Murray v. Okanogan Live Stock, etc. Co., 12 Wash. 259, 40 Pac. Rep. 942.

[3] Sage v. Shepard & M. Lumber Co., 4 App. Div. 290, 39 N. Y. Supp. 449, affirmed without opinion, 158 N. Y. 672.

[4] Fisher v. Brown, 104 Mass. 259, 6 Am. Rep. 235; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Hendricks v. Evans, 46 Mo. App. 313; B. L. Blair Co. v. Rose, 26 Ind. App. 487, 60 N. E. Rep. 10, citing the text.

[5] McKenney v. Haines, 63 Me. 74; Fosdick v. Greene, 27 Ohio St. 484, 22 Am. Rep. 328.

[6] Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35; Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. Rep. 162.

[7] Andrews v. Clark, 72 Md. 396, 440, 20 Atl. Rep. 429.

[8] Pond v. Baker, 58 Vt. 293, 2 Atl. Rep. 164; Patterson v. Gresham, 25 Ark. 380.

[9] Henshaw v. Bank, 10 Gray, 568.

poration which converts shares of stock issued by it during the existence of a life estate therein is liable to the person who owns the reversion for its value at the time his right accrues.[1] The conversion of logs does not take place until they are removed from the land of the owner because they are considered in law to be in his possession until that event.[2] One who disposes of the property of another without authority, or puts it out of his power to return it, or deals with it in a manner subversive to the dominion of the owner, is guilty of a conversion, and a demand is not necessary to fix his liability; that attached upon the unauthorized delivery of the property.[3] The conversion of stock occurs at the date of the holder's demand for recognition as a stockholder.[4] Nothing appearing to the contrary, the date of conversion is presumed to be that at which the property was taken into the possession of the wrong-doer.[5] In some cases the conversion occurs when property is seized, and not when it is finally used.[6] Where the conversion of bonds prevented the plaintiff from bidding upon the sale of the property represented by them, or taking other steps to protect his rights, the damages were assessed upon the value of such property at the time the initial steps in the conversion were taken, and not upon the price realized at the sale.[7] It is said in a late Massachusetts case that ordinarily the damages are to be assessed as of the date of the taking; yet when, as in this case, the property taken had no value at that time, because it was stock of a corporation not then launched into being, the date must be carried forward to the date when the value of the stock was fixed.[8] Though a mortgagee may be

[1] Caulkins v. Gaslight Co., 85 Tenn. 683, 4 S. W. Rep. 287, 4 Am. St. 786.

[2] Wright v. Skinner, 34 Fla. 453, 463, 16 So. Rep. 335. See Final v. Backus. 18 Mich. 218, stated in note to § 1010.

[3] Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112, 20 Atl. Rep. 203, 9 L. R. A. 260; Zindorf v. Western American Co., 26 Wash. 695, 67 Pac. Rep. 355.

[4] Gresham v. Island City Savings Bank, 2 Tex. Civ. App. 52, 21 S. W. Rep. 556; Ralston v. Bank of California, 112 Cal. 208, 44 Pac. Rep. 476; McLaughlin v. Bank of Victoria, 20 Vict. L. R. 433.

[5] Parker v. Harden, 121 N. C. 57, 28 S. E. Rep. 20.

[6] Fleckenstein v. Inman, 27 Ore. 328, 40 Pac. Rep. 87.

[7] Industrial & General Trust v. Tod, 52 App. Div. 195, 64 N. Y. Supp. 1093. Reversed on another question, 170 N. Y. 233, 63 N. E. Rep. 285.

[8] Hayward v. Leeson, 176 Mass. 310, 322, 57 N. E. Rep. 656, 49 L. R. A. 725.

authorized to take possession of mortgaged property whenever he chose and to sell the same at auction, if he takes it otherwise than for the purpose of sale he will he liable for its value when it was taken.[1]

§ 1113. Proof of value. The same rules govern as in other actions in which the question of value is involved.[2] Some value must be proved or the recovery cannot exceed a nominal sum, as where the only evidence on the subject is the cost of the property,[3] or its value at the time of the trial.[4] But if in case of the exercise by a lienor of dominion over property neither the date of the conversion nor the condition of the property at that time is shown the damage may be proved by showing its value when it came into his possession.[5] If the difficulty of proving value is very great and is the result of the defendant's act, he will not be relieved from liability on account thereof.[6] In ascertaining the value of shares of stock the inquiry may be extended to a reasonable time before or after their conversion;[7] but in order that their intrinsic value may be proven it must appear that there has been no market price within such time.[8] Good will is an element in determining the value of corporate stock.[9]

If a bailee's promise is to deliver property valued in his receipt for it at a specified sum he is bound thereby,[10] and if a

[1] Howery v. Hoover, 97 Iowa, 581, 66 N. W. Rep. 772.

[2] §§ 445, 446.

[3] Whitmark v. Lorton, 15 Daly, 548; Lincoln v. Packard, 25 Tex. Civ. App. 22, 60 S. W. Rep. 682; Griggs v. Day, 158 N. Y. 1, 23, 52 N. E. Rep. 692. See Mortimer v. Marder, 93 Cal. 172, 28 Pac. Rep. 814; Lines v. Alaska Commercial Co., 29 Wash. 133, 69 Pac. Rep. 642.

[4] Sonneberg v. Levy, 12 N. Y. Misc. 154, 32 N. Y. Supp. 1130.

[5] Lamb v. O'Reilly, 13 N. Y. Misc. 212, 34 N. Y. Supp. 235.

[6] Markoe v. Tiffany, 26 App. Div. 95, 49 N. Y. Supp. 751, affirmed without opinion, 165 N. Y. 565.

[7] B. L. Blair Co. v. Rose, 26 Ind. App. 487, 60 N. E. Rep. 10, and case cited in next note.

Evidence of the value of the property a week or ten days prior to its conversion is sufficient, there being nothing to show a change in value in the meantime. McLennan v. Minneapolis & N. Elevator Co., 57 Minn. 317, 59 N. W. Rep. 628.

[8] Douglas v. Merceles, 25 N. J. Eq. 144.

[9] Feige v. Burt, 124 Mich. 565, 83 N. W. Rep. 367; Long v. Evening News Ass'n, 113 Mich. 274, 71 N. W. Rep. 492; Washburn v. National Wall Paper Co., 81 Fed. Rep. 17, 26 C. C. A. 312; Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794; Beebe v. Hatfield, 67 Mo. App. 609.

[10] Healy v. Hutchinson, 66 N. H. 316, 20 Atl. Rep. 332; Wakefield v. Stedman, 12 Pick. 562.

portion of it is taken from him by process of law he must account for the difference between the value of the whole and of the remainder, regardless of the actual worth of the latter.[1] The finder of a jewel took it to a goldsmith to learn what it was; the latter returned the socket, but retained and refused to deliver the jewel. In trover by the finder, after evidence of the value of the finest jewel which would fit the socket, the court directed the jury that, unless the defendant produced the jewel and showed that it was not of the finest water, they should presume the strongest against him and make the value of the best jewel that would fit the socket the measure of damages.[2] This was by application of the maxim *omnia præsumuntur contra spoliatorem*.[3] Where foreign goods which have passed through a custom-house are in question it has been held in New York that the custom-house valuation may be introduced as evidence of value.[4] If there is only a distant market to which [491] the goods are destined the value there may be taken, with proper deductions for expenses which must be incurred and are usually incident to make that market available. Thus, in a proceeding in the nature of trover for the conversion of a whale in Okholsk sea, the value was determined by the market at New Bedford, which was the home port of both vessels involved, by deducting the expense of cutting in, boiling, freight and insurance.[5] So in trover for the capture on the high seas of a cargo bound for New York, the value at the time and place of the capture was arrived at by adopting New York prices, with deduction of a reasonable premium for in-

[1] Healy v. Hutchinson, *supra*.

[2] Armory v. Delamirie, 1 Str. 505.

[3] Hargreaves v. Hutchinson, 2 Ad. & E. 12; Curry v. Wilson, 48 Ala. 638; Kavanaugh v. Taylor, 2 Ind. App. 502, 28 N. E. Rep. 553; Goltra v. Penland, — Ore. —, 69 Pac. Rep. 925; Bailey v. Shaw, 24 N. H. 297, 55 Am. Dec. 241. See § 439.

[4] Caffe v. Bertrand, How. App. Cas. 224.

If a creditor having an absolute deed of land from his debtor as security convey the land to a *bona fide* purchaser, he is liable to the debtor for the proceeds of the sale or the value of the land, at the latter's election, less the amount of the debt. Meehan v. Forrester, 52 N. Y. 277.

On the sale of land under a judgment in fraud of the bankrupt law the assignee may recover its value; he is not limited to what it sold for. Clarion Bank v. Jones, 21 Wall. 325. See Norman v. Cunningham, 5 Gratt. 63.

[5] Bourne v. Ashley, 1 Low. 27; Saunders v. Clark, 106 Mass. 331. See Cockburn v. Ashland Lumber Co., 54 Wis. 619, 12 N. W. Rep. 49.

surance, and also adding damages equal to interest.[1] Where a schooner was converted while lying on a beach where there was no market for her, the court ruled that the damages were measurable by her value there, which was ascertainable by her value at some port where such vessels are sold, less the probable cost of getting her off the beach, repairing and getting her to market, less, also, a reasonable allowance for diminution in her value on account of her getting ashore and an allowance for the fair value of the risks in taking her to market. This last item might be measured by the charge for a fair salvage service.[2] The value of a canal boat may be determined by evidence of its worth at various ports on the canals which it navigates.[3] An intermediate consignee who converts the property consigned is liable for its value at the place of destination.[4]

The market value will govern rather than any special value to the owner arising from his having contracted it or otherwise, the defendant not being apprised of such special value.[5] If there is a market value at the place of conversion it will be adopted, though the property is intended to be shipped for sale to another place.[6] The master of a ship which became disabled on the voyage made an unauthorized sale of his cargo at an intermediate port and it sold low; in trover the jury were directed to give as damages the invoice price and the amount paid for freight.[7] In an action against an officer for the conversion of property seized by him the inventory and appraisement made and signed by him are admissible.[8] Evidence of the value put upon property by the parties in a previous exchange of properties made by them is competent.[9]

Where the property converted was of a peculiar kind, manufactured for a special market, and there was substantially no

[1] Hallett v. Novion, 14 Johns. 273.

[2] Glaspy v. Cabot, 135 Mass. 435.

[3] Keller v. Paine, 34 Hun, 167, 177.

[4] Farwell v. Price, 30 Mo. 587.

[5] Brown v. Allen, 35 Iowa, 306; Gardner v. Field, 1 Gray, 151; Watt v. Potter, 2 Mason, 77; Endel v. Norris, 15 Tex. Civ. App. 140, 39 S. W. Rep. 608. But see France v. Gaudet, L. R. 6 Q. B. 199; § 1117.

[6] Spicer v. Waters, 65 Barb. 227.

[7] Ewbank v. Nutting, 7 C. B. 797; Green v. McCracken, 64 Kan. 330, 67 Pac. Rep. 857.

[8] Maul v. Drexel, 55 Neb. 446, 76 N. W. Rep. 163.

[9] Castner v. Darby, 128 Mich. 241, 87 N. W. Rep. 199.

demand for it where the conversion occurred, its value at the place where it was to be sold, less the cost of transportation and sale, was considered in ascertaining its value where it was. The defendant's ignorance of the market for which it was designed was immaterial; he was liable for all the direct injury resulting from his act though he did not or could not have contemplated all its results.[1] The market price for like property, bought and sold in similar quantity, should be given. Stocks of goods cannot be recovered for at retail prices.[2] Neither is their value to be fixed by what a purchaser would give if obliged to take them as a whole. The most just test is the value of the goods in the packages they were in when the conversion took place, the value of all being aggregated.[3]

It has been ruled that the price at which goods were sold under process may be shown as proof of their market value.[4] "If the sale was at or near the time of the conversion, or if any appreciable time had intervened, it be shown that there had been no change in the goods or in market value, evidence of the prices for which they sold at auction is admissible on the question of their value."[5] A later Nebraska case holds otherwise, it being said that the sum realized by the officer at the attachment sale was no proper criterion for determining the value of the goods at the time of their conversion.[6] In New York proof of the price obtained for property at an actual *bona fide* sale, fairly conducted and not forced, whether at private or auction sale, is competent upon the question of value, the sale having taken place within a few months after the conversion.[7] In an action for the conversion of shares of stock

[1] Lathers v. Wyman, 76 Wis. 616, 45 N. W. Rep. 669.

[2] Wehle v. Haviland, 69 N. Y. 448 (overruling on this point Wehle v. Butler, 61 N. Y. 245); State v. Smith, 31 Mo. 566; Butler v. Collins, 12 Cal. 457; Nightingale v. Scannell, 18 Cal. 315; Miller v. Jannett, 63 Tex. 82; Perkins v. Ewan, 66 Ark. 175, 49 S. W. Rep. 569. See Haskell v. Hunter, 23 Mich. 305.

[3] Miller v. Jannett, 63 Tex. 82.

[4] Perkins v. Ewan, *supra*.

[5] Imhoff v. Richards, 48 Neb. 590, 595, 67 N. W. Rep. 483, citing Campbell v. Woodworth, 20 N. Y. 499; Brigham v. Evans, 113 Mass. 540; Kent v. Whitney, 9 Allen, 62, 85 Am. Dec. 739.

[6] Maul v. Drexel, 55 Neb. 446, 457, 76 N. W. Rep. 163. No reference is made to Imhoff v. Richards, *supra*. Watson v. Coburn, 35 Neb. 499, 53 N. W. Rep. 477, is cited.

[7] Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. Rep. 1032; Montignam v. E. V. Crandall Co., 34 App. Div. 228, 54 N. Y. Supp. 517.

having no market value the value cannot be fixed by the sum realized from the sale of the corporate assets after the conversion, the personal property having been sold by the officers of the corporation and the real estate having been sold under a mortgage owned by the defendant.[1] The cost of a machine which had been used several years before it was converted may be proved.[2] In the absence of a reason for not proving the market value of property at the place of its conversion its cost at a distant locality, with transportation charges added, is not a proper basis for estimating its market value at the former place.[3]

In trover for a quantity of tallow in Vermont, there being evidence that it was merchantable, it was held admissible to show its retail price at the time and place of the conversion.[4] Where books were converted and the plaintiff showed that copies had been sold to the trade and the price at which the sales were made, the defendant was not permitted to prove that the books were of but little value, nor what it would cost to reproduce the number he was charged with taking.[5] A purchaser who refuses to abide by a conditional contract of sale and does not return the property as he agreed cannot limit the recovery below its market value by proving the price fixed by him and the vendor.[6] In an action to recover for the injury done a newspaper by canceling its membership in a news-gathering association testimony may be received as to the number of proposed purchasers of the membership and the sums offered for it.[7] Where the pledgee of stocks had an option to buy them at a specified price his conversion of them was considered, at the election of the pledgor, as an exercise of the option, and the damages were measured by the price

[1] Feige v. Burt, 124 Mich. 565, 83 N. W. Rep. 367.

[2] Hawver v. Bell, 141 N. Y. 140, 36 N. E. Rep. 6; Prior v. Morton Boarding Stables, 43 App. Div. 140, 59 N. Y. Supp. 287; Jones v. Morgan, 90 N. Y. 4, 43 Am. Rep. 131. But see O'Neill v. Patterson, 26 N. Y. Misc. 3, 55 N. Y. Supp. 617. In accord with the text are McMahon v. Dubuque, 107 Iowa, 62, 77 N. W. Rep. 517, 70 Am. St. 143; Hannan v. Connett, 10 Colo. App. 171, 50 Pac. Rep. 214.

[3] Gensburg v. Marshall Field & Co., 104 Iowa, 599, 74 N. W. Rep. 3.

[4] Waters v. Langdon, 16 Vt. 570.

[5] Gunn v. Burghart, 47 N. Y. Super. Ct. 370.

[6] Fox v. Jones, 39 La. Ann. 929, 3 So. Rep. 95.

[7] Republican Newspaper Co. v. North Western Associated Press, 51 Fed. Rep. 377, 2 C. C. A. 282.

fixed. The plaintiff could not recover more than that sum, and it would have been inequitable to permit the defendant to reduce the damages to any less sum.[1] Where ore was taken from the plaintiff's mine without his knowledge until after the work had ceased, the testimony of a mining engineer who was familiar with local ore deposits as to his opinion, based upon the assay of samples taken by him from the worked mine and upon the testimony of miners who worked therein as to the character of the ore taken therefrom and the average value of that removed, was admissible.[2] If the market value does not furnish the true measure of damages the plaintiff may show, by any appropriate evidence, the actual injury sustained; and evidence of the value of the property prior or subsequent to the conversion is admissible to prove actual value at the time of the conversion.[3]

[492] **§ 1114. Same subject; fixtures.** If fixtures are severed from the freehold and trover is brought for them their value as chattels only, and not as fixtures, can be recovered.[4] In the comprehensive code action the technical impediments sometimes encountered in the prosecution of common-law actions in the way of embracing in one suit all the injurious elements of a wrong do not exist.[5] Accordingly, facts connected with a wrongful taking which would be admissible and relevant in an action of trespass and tend to increase the damages may be alleged and proved in an action for the taking and conversion. Thus, in an action for the unlawful taking and conversion of a quantity of household goods, including carpets, upon the question of damages as to the latter, a charge was approved which directed the jury to inquire what would be the value to a party who wanted to get the same articles

[1] Upham v. Barbour, 65 Minn. 364, 68 N. W. Rep. 42.

[2] Golden Reward Mining Co. v. Buxton Mining Co., 97 Fed. Rep. 413, 38 C. C. A. 228.

[3] Rivinus v. Langford, 75 Fed. Rep. 959, 21 C. C. A. 581, citing Suydam v. Jenkins, 3 Sandf. 614; Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. Rep. 1032; Peek v. Derry, 37 Ch. Div. 541; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28.

[4] Clarke v. Holford, 2 C. & K. 540; Lynch v. White, 73 S. W. Rep. 835 (Tex. Ct. of Civ. App.). See Ayer v. Bartlett, 9 Pick. 156.

The rule is otherwise when the property converted is lawfully attached to realty and the conversion is by the owner of the latter. § 1110.

[5] Clark v. Bates, 1 Dak. 42, 46 N. W. Rep. 510; Rhoda v. Alameda County, 58 Cal. 357.

again; that it was proper to include not only their worth in the market, but also the value of the labor in cutting, making and putting them down.[1] But when the property so in place can no longer be there used by the owner and he is subject to summary removal, its value will be estimated in case of conversion with reference to these facts; it will be estimated with reference to the condition in which the property will be when removed or as subject to the obligation or necessity of removal.[2]

§ 1115. Interest. In England the allowance of interest under the operation of the statute of 3 and 4 William IV.[3] is a matter of discretion with the jury. With us it is generally held to be matter of right from the time of the valuation; it is considered a constituent part of the indemnity which a party entitled to recover the value may claim,[4] and it is the duty of the court to direct the jury to allow it from the date of conversion.[5] In Colorado and Georgia interest is allowed as damages.[6] In North Carolina, Indiana and Missouri the awarding of interest is discretionary with the jury.[7] This view is [493]

[1] Starkey v. Kelly, 50 N. Y. 677.

[2] Moore v. Wood, 12 Abb. Pr. 393; Johnston v. Albany Dry Goods Co., 12 App. Div. 608, 43 N. Y. Supp. 164, quoting the text.

[3] Ch. 42, § 29.

[4] It should be demanded in the complaint. Horner v. Missouri Pacific R. Co., 70 Mo. App. 285.

[5] Suydam v. Jenkins, 3 Sandf. 620 *et seq.*; Wilson v. Conine, 2 Johns. 280; Bissell v. Hopkins, 4 Cow. 53; Hyde v. Stone, 7 Wend. 354, 22 Am. Dec. 582; Baker v. Wheeler, 8 Wend. 505; Dillenback v. Jerome, 7 Cow. 294; Stevens v. Low, 2 Hill, 132; Chauncey v. Yeaton, 1 N. H. 151; McCormick v. Pennsylvania Central R. Co., 49 N. Y. 303; Hamer v. Hathaway, 33 Cal. 117; Northern Transportation Co. v. Sellick, 52 Ill. 249; Tarpley v. Wilson, 33 Miss. 467; Worsham v. Vignal, 5 Tex. Civ. App. 471, 24 S. W. Rep. 562; Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. Rep. 129; New Dunderberg Mining Co. v. Old, 97 Fed. Rep. 150, 38 C. C. A. 89.

If the conversion has occurred under a mutual mistake of fact, no fraud or misconduct existing on the part of the wrong-doer, his liability for interest will not antedate the discovery of the mistake and demand. Craufurd v. Smith, 93 Va. 623, 23 S. E. Rep. 235.

A carrier's liability for interest dates from the conversion, not from the time it received the goods. Horner v. Missouri Pacific R. Co., 70 Mo. App. 285.

[6] Omaha & Grant S. & R. Co. v. Tabor, 13 Colo. 41, 58, 21 Pac. Rep. 925, 16 Am. St. 185, 5 L. R. A. 236; Sylvester v. Craig, 18 Colo. 44, 31 Pac. Rep. 387; Martin v. Oslin, 94 Ga. 658, 19 S. E. Rep. 988.

[7] Stephens v. Koonce, 103 N. C. 266, 9 S. E. Rep. 315; Kavanaugh v. Taylor, 2 Ind. App. 502, 28 N. E. Rep. 553; Hawkins v. Kansas City Hydraulic

favored in a recent New York case.[1] Another case in that state declares that if the property converted was merchandise kept for sale the plaintiff who has made advances upon it is entitled to recover interest as a matter of law.[2] In Vermont it is proper for the jury to consider the time which has elapsed since the conversion to determine the fair compensation due for the injury.[3] Interest should be at the legal rate, not at the rate which the converted securities bore,[4] and the rate should be that fixed by the law of the forum.[5] The plaintiff should not be permitted to recover, besides the value of animals or slaves and interest, their hire or the value of their services or use, nor in lieu of interest.[6] In some cases this has been allowed.[7] If damages are recovered for lost profits interest should not be added.[8]

§ 1116. Recovery for property subject to sale. Where the plaintiff held the property as sheriff or assignee and would have been obliged to sell it at auction if the plaintiff had not taken it and the conversion was followed by a sale, there does not appear to be any reason or precedent for adopting any different measure of damages or rule of proof on that account if the plaintiff is not restricted to some special value or mode of proof. It was remarked in one such case[9] that it often happens that a jury considers the sum at which the goods were actually sold at auction as a fair measure of damages. The owner was entitled to remove buildings standing upon ground condemned for a street; he neglected to do so and the public authorities, desiring to use the ground, disposed of them by a public sale. It was held that the plaintiff, by his neglect

Press Brick Co., 63 Mo. App. 64; Wheeler v. McDonald, 77 id. 213; State v. Hope, 121 Mo. 34, 25 S. W. Rep. 893; Carson v. Smith, 133 Mo. 606, 34 S. W. Rep. 855.

[1] Toplitz v. Bauer, 161 N. Y. 325, 336, 57 N. E. Rep. 1059, 34 App. Div. 526, 55 N. Y. Supp. 20.

[2] Einstein v. Dunn, 61 App. Div. 195, 70 N. Y. Supp. 520.

[3] Clement v. Spear, 56 Vt. 401; Davis v. Bowers Granite Co., — Vt. —, 54 Atl. Rep. 1084.

[4] Govin v. De Miranda, 140 N. Y. 474, 35 N. E. Rep. 626.

[5] Carson v. Smith, *supra*.

[6] Polk v. Allen, 19 Mo. 467; Fail v. Presley, 50 Ala. 342; Frey v. Drahos, 7 Neb. 194; Endel v. Norris, 15 Tex. Civ. App. 140, 39 S. W. Rep. 608.

[7] Dealy v. Lance, 2 Spears, 487; Schley v. Lyon, 6 Ga. 530; Banks v. Hatton, 1 Nott & McC. 221. See Hair v. Little, 28 Ala. 236.

[8] McGuire v. Galligan, 53 Mich. 453, 19 N. W. Rep. 142.

[9] Whitehouse v. Atkinson, 3 C. & P. 344.

to remove the buildings, consented to the mode adopted to dispose of them; therefore, in an action for their conversion his recovery was limited to the net proceeds of that sale.[1] In an English *nisi prius* case a distinction appears to have been recognized in the case of property which had to be sold. Goods were sold by a sheriff after bankruptcy, but in good faith. The assignees were held to be entitled only to an amount equal to the proceeds, less the expenses of selling. As the assignees would be bound to sell the jury were allowed a discretion to deduct the expenses.[2] But in a later case the court considered that if the trustee in bankruptcy elected to treat the sale as a tort he was entitled to the full value of the goods and any damages resulting to the estate from the sale; that he was not confined to the proceeds except upon a ratification of the sale.[3]

§ 1117. Damages if property without market value. [494] This subject has been considered in other parts of this work, and it is not necessary here to enter upon it at large.[4] If the property has no market value at the time and place of conversion, either because of its limited production or because it is of such a nature that there can be no general demand for it, and it is more particularly valuable to the owner than any other it may be estimated with reference to its value to him.[5] A

[1] Peters v. Mayor, 8 Hun, 405; Light v. Hardy, 29 Ont. 25.

[2] Clark v. Nicholson, 6 C. & P. 712.

[3] Smith v. Baker, L. R. 8 C. P. 350; Clarion Bank v. Jones, 21 Wall. 328.

[4] §§ 652, 655, 1099.

If the market value of ordinary second-hand household goods is testified to by a competent witness and there are dealers in that kind of property in the city in which the conversion took place, it must not be assumed that such goods have no market value; nor must the jury be allowed to give their fair value to the owner in the absence of testimony showing what it is. Iler v. Baker, 82 Mich. 226, 46 N. W. Rep. 377.

[5] Suydam v. Jenkins, 3 Sandf. 620; State v. Sullivan, — Mo. App. —, 74 S. W. Rep. 417; Green v. Boston, etc. R. Co., 128 Mass. 221, 35 Am. Rep. 370; Stickney v. Allen, 10 Gray, 352; Sturges v. Keith, 57 Ill. 463, 11 Am. Rep. 28; Sell v. Ward, 81 Ill. App. 675; Wamsley v. Atlas Steamship Co., 50 App. Div. 199, 63 N. Y. Supp. 761, reversed on another question, 168 N. Y. 533, 61 N. E. Rep. 896; Lovell v. Shea, 60 N. Y. Super. Ct. 412, 18 N. Y. Supp. 193; Bateman v. Ryder, 106 Tenn. 712, 64 S. W. Rep. 48.

It was said in a case where electrotype plates were converted that "the actual value to one who owns and has use for them is the just rule of damages." Heald v. Macgowan, 15 Daly, 233, affirmed without opinion, 117 N. Y. 643.

It is said, *arguendo*, in Freon v. Carriage Co., 42 Ohio St. 30, 38, where

wine merchant having obtained from a broker samples of wine then lying at a wharf, which the broker had agreed to sell at 14*s.* per dozen, sold it to the captain of a ship about to sail at 24*s.* per dozen, to be delivered on board the next day. The merchant obtained the delivery warrants from the broker and claimed the wine from the wharfinger, but he refused to deliver it. No other wine of the same brand and quality was to be had in the market, and the merchant was held entitled to recover in trover the actual value of the wine to him, which at the time of the conversion was 24*s.* per dozen, he having made a *bona fide* sale of it at that price.[1] Mellor, J., said: "Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion; and in case the plaintiff could by going into the market have purchased other goods of like quality and description, the price at which that could have been done would be the measure of damages. It was, however, admitted on the trial, in the present case, that that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market so as to enable the plaintiff to fulfill his contract with Captain H. We are of opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion; and that a *bona fide* sale having been made to a solvent customer at 24*s.* per dozen, which would have been realized had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired the actual value of 24*s.* per dozen; and we think that, in the present [495] case, that ought to be the measure applied; and that a jury would not only have been justified in ascertaining that to be the value, but ought, where the transaction was *bona fide*, to have taken that as a measure of damages, and . . . we think we ought to say that such is the proper measure of dam-

it was claimed that stock had no market value, that the damages were not limited to that value; its actual value was determinable under all the circumstances, such as the dividend-making capacity, good-will, etc., of the corporation.

If music books are annotated by the owner so as to give them a special value for him he is entitled to compensation for such value. Leoncini v. Post, 37 N. Y. St. Rep. 255, 13 N. Y. Supp. 825.

[1] France v. Gaudet, L. R. 6 Q. B. 199.

ages. . . . We are not prepared to say that there is any analogy between the case of contract . . . in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract special damages, reasonably resulting from the breach of it, may be considered within the contemplation of the parties. In case of trover it is not in general special damages which can be recovered, but a special value attached by special circumstances to the article converted; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are then determined; no notice to the wrong-doer could then *affect the value*, although it might affect his conduct; but upon what principle is notice necessary to a man who *ex hypothesei* is a wrong-doer? In such a case as the present the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from the rightful owner, who thereby sustains 'an actual present loss,' which appears to us to be a convertible term with actual value." [1]

The owner of pamphlets which are alleged to be without the pale of the law because they contain matter which scoffs at and indecently attacks the Christian religion nevertheless has property in them independently of the printing, and is entitled to damages to the extent of the value of the paper, etc. If the pamphlets are not illegal the damages must be based

[1] The judge further distinguished the value from special damages by observing: "It is not necessary to determine whether notice is or is not necessary in trover in order to enable the plaintiff to recover special damage, which cannot form part of the actual present value of the thing converted, as in the case of withholding the tools of a man's trade, in which the damage arising from the deprivation of his property is not, and apparently cannot be, fixed at the time of the conversion of the tools. In that case, however, we are inclined to think that either express notice must be given, or arise out of the circumstances of the case. This point was not determined in Bodley v. Reynolds, 8 Q. B. 779, approved in Wood v. Bell, 5 El. & B. 772, but we think there must have been evidence of knowledge on the part of the defendant that, in the nature of things, inconvenience beyond the loss of the tools must have been occasioned to the plaintiff." See Seymour v. Ives, 46 Conn. 109.

upon their value as such as of the time of the tort.[1] One who is not engaged in editing a newspaper cannot recover compensation for the inconvenience which one so employed would experience from being deprived of the possession of a file of newspapers covering the period while he was such editor.[2] Where negatives converted had no market value it was competent to show the nature of the property, the cost of obtaining the photographs, the purpose for which they were procured, and the difficulty of replacing them. The jury might also consider the value of the property to the plaintiff.[3] If it is shown that the property converted was without market value where the tort was committed, its actual value may be recovered.[4] In the absence of proof of general market value the price at which the owner of the property had contracted to sell it may be shown.[5]

[496] **§ 1118. Damages if property of fluctuating value.** As to the measure of damages for the conversion of such property there has been much conflict of opinion. The cases are numerous, and a review of them in detail would be prolix and unprofitable. The principal difference is that the courts in some states adhere to the general rule of damages where such property is in question, allowing the value at the time of the conversion and interest, whether the property converted is stock or not.[6] And in others, the courts allow the highest market value between the time of the conversion and the commencement of suit or the trial; though some of the latter annex

[1] Boucher v. Sherwan, 14 Up. Can. C. P. 419.

[2] Leffingwell v. Gilchrist, 40 Iowa, 416.

[3] Wamsley v. Atlas Steamship Co., 50 App. Div. 199, 63 N. Y. Supp. 761, reversed on another question, 168 N. Y. 533, 61 N. E. Rep. 896.

[4] Gensburg v. Marshall Field & Co., 104 Iowa, 599, 74 N. W. Rep. 3.

[5] Clements v. Burlington, etc. R. Co., 74 Iowa, 442, 38 N. W. Rep. 144.

[6] Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; McKenney v. Haines, 63 Me. 74; Fisher v. Brown, 104 Mass. 259, 6 Am. Rep. 235; Pinkerton v. Railroad Co., 42 N. H. 463; Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35; Boylan v. Huguet, 8 Nev. 345; Bates v. Stansell, 19 Mich. 91; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. Rep. 842, 59 Am. Rep. 823; Galena, etc. R. Co. v. Ennor, 123 Ill. 505, 14 N. E. Rep. 673; First Nat. Bank v. Strong, 28 Ill. App 325, 338; Baltimore M. Ins. Co. v. Dalrymple, 25 Md. 244; Noonan v. Ilsley, 17 Wis. 314, 84 Am. Dec. 742; Ingram v. Rankin, 47 Wis. 406, 2 N. W. Rep. 755, 32 Am. Rep. 762; Enders v. Board of Public Works, 1 Gratt. 364; White v. Salisbury, 33 Mo. 150; Continental Divide Mining Investment Co. v. Bliley, 23 Colo, 160, 46 Pac. Rep. 633.

the limitation that the suit be commenced within a reasonable time and prosecuted to trial with due diligence.[1] It is intimated in Florida that in the case of stocks held for investment, or rare pictures, jewels and the like articles held otherwise than for immediate commercial purposes, it is equitable and proper that the highest value after conversion should measure the damages if the jury should be satisfied that the plaintiff would have held the property up to the time it increased in value.[2] In Alabama the allowance of this measure of damages is discretionary with the jury;[3] and so in Wyoming[4] and South Carolina.[5] In California, the late territory of Dakota, Montana and Georgia, by virtue of statutory provisions, the highest market value may be recovered at the option of the injured party, if suit is begun within a reasonable time. If such value is claimed interest cannot be recovered.[6] In North Dakota and South Dakota the statutes provide for the recovery of the value of the property at the time of its conversion, with interest, or, where the action is prosecuted with reasonable diligence, the highest market value at any time between the conversion and the verdict, without interest, at the option of the injured party. In North Dakota the court disapproves the highest market value rule on the ground that it is not cal-

[1] In re Swift, 114 Fed. Rep. 947; Clark v. Pinney, 7 Cow. 681; Stapleton v. King, 40 Iowa, 278 (but Gravel v. Clough, 81 id. 272, 46 N. W. Rep. 1092, and Brown v. Allen, 35 Iowa, 306, are inconsistent with the rule of the highest intermediate market value); Loeb v. Flash, 65 Ala. 526; Galigher v. Jones, 129 U. S. 192, 9 Sup. Ct. Rep. 335; Tatum v. Manning, 9 Ala. 144; Guerry v. Kerton, 2 Rich. 507; Ewing v. Blount, 20 Ala. 694; Jenkins v. McConico, 26 id. 213; Kid v. Mitchell, 1 Nott & McC. 334, 9 Am. Dec. 702; Kent v. Ginther, 23 Ind. 1; Stephenson v. Price, 30 Tex. 715; Hatcher v. Pelham, 31 id. 201; Johnson v. Marshall, 34 Ala. 521; Freer v. Cowles, 44 id. 314; Boutwell v. Parker, 124 Ala. 341, 27 So. Rep. 309; Ralston v. Bank of California, 112 Cal. 208, 44 Pac. Rep. 476; San Antonio, etc. R. Co. v. Wilson, 4 Tex. Civ. App. 178, 23 S. W. Rep. 282. See Hubbell v. Blandy, 87 Mich. 209, 49 N. W. Rep. 502, 24 Am. St. 154.

[2] Moody v. Caulk, 14 Fla. 50.

[3] Boutwell v. Parker, 124 Ala. 341, 27 So. Rep. 309; Loeb v. Flash, 65 Ala. 526; Burkes v. Hubbard, 69 id. 379; Terry v. Birmingham Nat. Bank, 93 id. 599, 9 So. Rep. 299, 30 Am. St. 87.

[4] Hilliard Flume Co. v. Woods, 1 Wyo. 396.

[5] Kid v. Mitchell, 1 Nott & McC. 334, 9 Am. Dec. 702; Carter v. Du Pre, 18 S. C. 179; Burney v. Pledger, 3 Rich. 191; Harley v. Platts, 6 id. 318.

[6] Jaques v. Stewart, 81 Ga. 81, 6 S. E. Rep. 815; Smith v. Caldwell, 22 Mont. 331, 339, 56 Pac. Rep. 590.

culated to promote justice. Damages cannot be recovered under it unless the plaintiff affirmatively shows that he has commenced and prosecuted his action with reasonable diligence. No presumption will be indulged in his favor, and the statute will be strictly construed against him.[1] In South Dakota, notwithstanding the plaintiff may have demanded in his complaint that the damages be assessed under the first statutory rule, if the case is tried on the theory that the recovery may be under the other rule, the testimony as to damages all relating to that measure, the court may assume that both parties have agreed to that rule.[2] In England where there is a breach of an agreement to replace borrowed stock the damages are measured by its highest price on or before the day of the trial.[3]

§ 1119. Same subject; criticism and modification of the [497] **rule.** The cases which originated this exception to the general rule have proceeded upon the plausible principle that the owner who has been tortiously deprived of his property should have the benefit of any subsequent increase in its value, and not the wrong-doer; that where the advance is owing to general causes it would be unjust to allow the latter to determine the date of fixing the value that he should pay for a tort, as he might select a time of great depression to convert the [498] property and by having the benefit of a future appreciation derive large gains by his own wrong. To prevent this seeming injustice the owner at the time of the trial has been allowed a retrospection of the intermediate market and to recover the highest price reached during that period. This would not be unfair to the defendant nor more than a just indemnity to the owner if it were shown by the evidence that that was his real loss; that had the defendant done nothing to prevent [499] his retaining the property he would have sold it and realized that price, or that he has in fact realized it. But the owner is more than compensated when he is allowed to recover

[1] Pickert v. Rugg, 1 N. D. 230, 46 N. W. Rep. 446; First Nat. Bank v. Minneapolis & N. Elevator Co., 8 N. D. 430, 79 N. W. Rep. 874.

[2] Rosum v. Hodges, 1 S. D. 308, 47 N. W. Rep. 140, 9 L. R. A. 817. See Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. Rep. 427, as to the effect of the trial of a case upon a theory of damages variant with that on which the complaint was drawn.

[3] Cud v. Rutter, 1 P. Wms. (4th ed.) 572, n. 3; Owen v. Routh, 14 C. B. 327; Loder v. Kekule, 3 C. B. (N. S.) 127; France v. Gaudet, L. R. 6 Q. B. 199. See § 1123.

on review of the market more than he would have sold for during the same period. By allowing him uniformly the highest intermediate market price he is saved from all hazard of mistake in this regard and the wrong-doer is made to bear it without any possibility of gain for his sagacity, if he has sold at the right time; and without premium or compensa- [500] tion to mitigate his loss in being obliged to indemnify the owner if he makes the common mistake of selling too soon or too late. These obvious considerations have prevented the adoption, as a uniform and invariable measure of damages, of the highest intermediate value where it has been fluctuating. In some states where the courts were once committed to this exceptional rule cases have since arisen in which its application would be so manifestly unjust that it has been reconsidered and substantially abandoned. This has notably occurred in New York and California. In Baker v. Drake[1] the court reviewed the previous decisions in the former state on this general question and subjected them to the test of the fundamental principle on which damages are assessed, namely: that in civil actions the rule of damages does not depend on the form of the action; that whether the action be on contract or in tort, the proper measure, except where punitory damages are allowed, is a just indemnity to the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the person complaining would not have averted. And the court reached the conclusion that a fixed, unqualified rule giving the plaintiff in all cases of conversion the highest market price from the time thereof to the time of trial cannot be applied upon any sound principle of reason or justice. The case was against a broker who had purchased stock for a customer, the plaintiff, not as an investment but upon speculation, the latter furnishing a small amount as a margin and the former supplying the residue of the capital embarked in the speculation. The broker made an unauthorized sale of the stock; and it was held that if, upon being advised of the sale, the customer desired further to prosecute the adventure, he had a right to disaffirm the sale and to require the broker to [501]

[1] 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80.

replace the stock; and upon his failure or refusal to do this that the remedy of the principal was to replace it himself, and that the advance in the market price from the time of the sale up to a reasonable time to replace it after notice of the sale would afford a complete indemnity and was the proper measure of damages. The case of Markham v. Jaudon,[1] so far as it relates to the rule of damages, was overruled. Later decisions have approved and followed Baker v. Drake.[2] This rule has been applied where the owner of stock which had been pledged had fully paid for it, the sale having been made in good faith under an honest mistake.[3]

The existing rule in New York is approved by the supreme court of the United States in a case which was not governed by the local law of that state,[4] and by the court of errors and appeals of New Jersey, which said that when commercial securities pledged as collateral for the payment of a debt are sold by the pledgee without authority before maturity of the debt, the pledgor may ratify the sale and claim the proceeds, or treat the unauthorized sale as a conversion and recover the advance in the market price from the time of the sale up to a reasonable time within which to replace the securities, or hold the pledgee for the breach of his duty to keep the property pledged until the maturity of the debt and claim as damages the market value of the securities at that time.[5] In Indiana the period for limiting the increase in the value of stock is such reasonable time after the owner has received notice of the conversion as will enable him to replace the stock, especially where the wrong was not wilful and fraudulent and no

[1] 41 N. Y. 235.

[2] Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623; Tyng v. Commercial Warehouse Co., 58 id. 308; Mechanics', etc. Bank v. Farmers', etc. Bank, 60 id. 40; Thayer v. Manley, 73 id. 307; Harris v. Tumbridge, 83 id. 99, 100, 38 Am. Rep. 398; Wolff v. Lockwood, 70 App. Div. 569, 75 N. Y. Supp. 605; Burhorn v. Lockwood, 71 App. Div. 301, 75 N. Y. Supp. 828; Gruman v. Smith, 81 N. Y. 27; Colt v. Owens, 90 id. 368; Smith v. Savin, 141 N. Y. 315, 36 N. E. Rep. 338; Minor v. Beveridge, 141 N. Y. 399, 36 N. E. Rep. 404, 38 Am. St. 804; Griggs v. Day, 158 N. Y. 1, 22, 52 N. E. Rep. 692. See Hubbell v. Blandy, 87 Mich. 209, 49 N. W. Rep. 502, 24 Am. St. 154.

[3] Wright v. Bank, 110 N. Y. 237, 18 N. E. Rep. 79, 1 L. R. A. 289.

[4] Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. Rep. 335; Rivinus v. Langford, 21 C. C. A. 581, 75 Fed. Rep. 959.

[5] Dinock v. United States Nat. Bank, 55 N. J. L. 296, 25 Atl. Rep. 926, 39 Am. St. 643.

benefit resulted to the defendant. If the stock belonged to an estate the knowledge of its conversion, for the purpose of fixing a time for its valuation, should be that of some one charged with the duty to act and who was not connected with the wrong.[1] A recent Oregon case impliedly favors the New York rule,[2] as does such a case in Utah.[3] In California the rule of the highest intermediate value was twice held, and in the last instance it was treated as the doctrine of the state.[4] But a later case subjected that rule to an ordeal that exploded it.[5] The property in question was hay; it had been wrongfully taken by the defendant in 1863, when it was worth from $3 to $5 per ton; but at an expense of something over $5 per ton for transporting it, it might have been sold for $12.50 per ton. In the following year there was great scarcity of hay and the price rose to about $40 per ton. The case was tried in November, 1869, and the jury instructed that the plaintiff was entitled to the highest market value between the taking and the trial, with interest. This instruction was disapproved in a strong opinion which clearly shows the injustice of the rule.

[1] Citizens' Street R. Co. v. Robbins, 144 Ind. 671, 24 N. E. Rep. 916.

The court said: "To adopt the value as existing at the time of actual conversion would enable the converting holder to make the market for the owner and deprive him of his stock, whether he so wills or not. To adopt the highest value between the time of actual conversion and the trial is to encourage the owner to delay and speculate upon the chances of higher markets without assuming the chances of lower markets. If he know of the conversion and have a reasonable time in which to make himself whole by resorting to the markets, his loss is that which his stock should have yielded to that time, for he may then assume his position as a stockholder at a value to be charged to the defendant." B. L. Blair Co. v. Rose, 26 Ind. App. 487, 60 N. E. Rep. 10.

[2] Budd v. Multnomah Street R. Co., 15 Ore. 413, 15 Pac. Rep. 659, 3 Am. St. 169.

[3] Walley v. Desert Nat. Bank, 14 Utah, 305, 47 Pac. Rep. 147.

[4] Douglass v. Kraft, 9 Cal. 562; Hamer v. Hathaway, 33 id. 117.

[5] Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462.

By the California code, § 3336, it is declared that the measure of detriment for conversion of personal property is presumed to be, 1, the value of the property at the time of the conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value between the conversion and the verdict, without interest, at the option of the injured party; and 2, a fair compensation for the time and money properly expended in pursuit of the property. See Barrante v. Garratt, 50 Cal. 112; Fairbanks v. Williams, 58 id. 241. A delay of three months in bringing an action does not deprive a plaintiff of the benefit of this provision. Froman v. Sierra Nevada Silver Mining

§ 1120. Same subject; conflict in New York cases. In New York there were many decisions prior to Baker v. Drake which adopted or affirmed the rule of the highest intermediate value.[1] But while this course of decision was in progress other cases were decided in that state somewhat out of harmony with it and in accord with the later adjudications. In one case there had been a wrongful sale of stock by a pledgee.[2] Part of it was demanded afterwards, and the damage for its conversion was held to be its value at the date of the demand with interest. Another part was not demanded, and for its conversion its value within a reasonable time after the wrongful sale was allowed, the pledgee being permitted to deduct its cost, which he had paid for the plaintiff. In another case[3] a factor at Buffalo had wheat on consignment from his princi- [505] pal, who directed him to sell it at a specified price on a given day, or, if not sold that day, to ship to New York. The factor sold it the day after that specified. If the directions of the principal had been followed the wheat would have reached New York between the 27th and the 31st of July, at an expense for transportation of fifteen cents per bushel. The New York market fluctuated between July 25th and November 29th from $1.25 to $1.65 per bushel. The unauthorized sale was treated as a conversion, and the measure of damages was held to be the difference between the price for which the wheat was sold, the proceeds of the unauthorized sale having been paid over, and what it was worth during a reasonable time afterwards, which was held to embrace the residue of the season to November 29th, when navigation of the river and canal closed. Had it appeared at what time the plaintiff intended to sell, after the arrival of the wheat in New York, the damages would have been computed with reference to its value at that time. In another case,[4] where a pledgee converted the pledge, which consisted of warehouse receipts for corn, the court, by Church, C. J., referring to the rule of the

Co., 61 Cal. 629. See § 1118 for the rule under the code of North Dakota.

[1] West v. Wentworth, 3 Cow. 82; Clark v. Pinney, 7 Cow. 681; Blot v. Boiceau, 3 N. Y. 85; Romaine v. Van Allen, 26 id. 309; Wilson v. Mathews, 24 Barb. 295; Burt v. Dutcher, 34 N. Y. 493; Willard v. Bridge, 4 Barb. 361; Markham v. Jaudon, 41 N. Y. 235; Lobdell v. Stowell, 51 N. Y. 70; Lawrence v. Maxwell, 6 Lans. 469.

[2] Brass v. Worth, 40 Barb. 648.

[3] Scott v. Rogers, 31 N. Y. 676.

[4] Matthews v. Coe, 49 N. Y. 57.

highest intermediate value, observed: "Whatever may be said of the propriety of such a rule, in any case not special and exceptional in its circumstances, it should not be applied in a case like this. The price was fixed a year and a half after the original action was commenced. There is not the slightest evidence that the plaintiff or his assignor contemplated or desired to keep the corn. On the contrary, it affirmatively appears that the intention was to sell it when it reached $1 a bushel, and such was the agreement, while the price allowed was $1.45. Besides, the evidence shows that it would have been difficult, if not impossible, to have preserved it until the time when the price was fixed. . . . An unqualified rule, giving a plaintiff in all cases of conversion the highest price to the time of trial, I am persuaded cannot be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time and prosecuted with reasonable diligence, relieve it of its objectionable character."

In a case still earlier than these[1] Mr. Justice Duer [506] delivered a masterly opinion which contains a thorough discussion of the law of compensation for the loss of personal property by tort and breach of contract, upon principle and authority in opposition to the rule of the highest intermediate value, except upon proof of such facts as makes it manifest that it is a just indemnity for the owner's actual loss, or gives him a value which the wrong-doer actually obtained or might have realized. He says: "It seems to us exceedingly clear that the highest price for which the property could have been sold, at any time after the right of action accrued and before the entry of judgment, cannot, except in special cases, be justly considered as the measure of damages. Whenever the evidence justifies the conclusion that a higher price would have been obtained by the owner had he kept the possession, or has been obtained by the wrong-doer, we have admitted and shown that it ought to be included in the estimate of damages; in the first case, as a portion of the indemnity to which the owner is entitled; and, in the second, as a profit which the wrong-doer cannot be permitted to retain; but we cannot ad-

[1] Suydam v. Jenkins, 3 Sandf. 614.

mit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is proved that it would not have been obtained by the owner and has not been obtained by the wrong-doer. Its allowance in these cases would in truth impose a penalty upon the wrong-doer and render the damages vindictive instead of remunerative; and it must be remembered that we are treating exclusively of the cases in which vindictive damages are not claimed, or, if claimed, ought not to be given."

§ 1121. Same subject; Pennsylvania rule. In Pennsylvania the point under discussion has had pretty nearly the same history, beginning with Bank v. Reese.[1] In that case the court held that where bank stock has been wrongfully withheld from a party entitled to it the measure of damages, where the consideration had been paid, is the highest market value between the breach and the trial, together with the [507] bonus and dividends which have been received in the meantime; but where the consideration has not been paid, the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock. Strong reasons are given why the general rule should not apply where the articles could not be procured elsewhere, and where, because of restrictions on its production or other causes, its price is subject to considerable fluctuations. But the conclusion that the loss is the highest intermediate value is not so satisfactorily sustained where it rests merely on the inference that the owner would have realized it. It is true, as said in Harrison v. Harrison,[2] that "justice is not done if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time;" but it does not maintain this measure of redress except in a retributive, rather than a compensatory, sense, to say we cannot act upon the possibility of his not keeping it, or that, if it was stock bought on speculation to be sold at the best opportunity, it will be assumed that but for the defendant's

[1] 26 Pa. 143. See Musgrave v. Beckendorff, 53 id. 310.
[2] 1 C. & P. 412.

wrong the plaintiff would so have disposed of it. The English decisions referred to may have proceeded, and there is reason to suppose they did, on the reasonable presumption, from prevalent habit, that the stock was intended as a permanent investment and therefore would be kept until the trial. That presumption is quite unlike one that if stock is bought to be sold again for profit the holder will sell when the market is the most favorable. This Pennsylvania case is subsequently referred to as laying down a principle exclusively applicable to a party who is bound by a contract or trust duty to deliver stock.[1] And finally that the rule here laid down has no application to trover and does not apply to ordinary stock contracts; that it applies between trustee and beneficiary, or to cases where justice cannot be reached by the ordinary measure of damages.[2] It is said in the opinion of one of the courts of common pleas in an action by a stockholder against a corporation to recover for the wrongful transfer of the plaintiff's shares upon a forged power of attorney, which opinion was approved by the supreme court, that the recent cases decide that in all actions not involving an actually wrongful conversion or breach of trust the old and well-established rule still prevails that the value of the stock at the time of the technical conversion, with interest thereon, is the measure of damages.[3]

[1] Neiler v. Kelley, 69 Pa. 403; Work v. Bennett, 70 id. 484.

[2] Huntingdon, etc. Coal Co. v. English, 86 Pa. 247; North v. Phillips, 89 id. 250; Wagner v. Peterson, 83 id. 238; In re Jamison's Estate, 163 Pa. 143, 29 Atl. Rep. 1001; Pennsylvania Co. v. Philadelphia, etc. R. Co., 1 Pa. Dist. Rep. 301.

In Jennings v. Loefler, 184 Pa. 318, 39 Atl. Rep. 214, an action for the breach of a contract to return borrowed stock, the rule declared in Huntingdon, etc. Co. v. English, *supra*, that the rights of the parties were definitely fixed when the breach occurred, is approved. In the later case the highest price was that ruling at the time of demand and refusal.

In Jamison's Assigned Estate, 3 Pa. Dist. Rep. 217, it is held that a broker who buys a specific stock for a customer is a trustee thereof; and that a conversion of it to his own use makes him liable for its highest value until restitution is made; but that the rights and claims of all parties upon the assets of an assigned estate are fixed by the assignment, and the right of the customer to have the full value of his stock at that time is then matured.

The trust relation referred to in the Pennsylvania case "would probably be deemed to exist between a stock broker and his client." Galigher v. Jones, 129 U. S. 193, 201, 9 Sup. Ct. Rep. 335.

[3] Pennsylvania Co. for Insurance v.

§ 1122. Same subject; Massachusetts rule. The rule of the highest market value within a reasonable time after a sale has been made by a factor in contravention of the orders of his principal has been approved in Massachusetts.[1] But no distinction is made there as to the measure of compensation for the conversion of different classes of property in other cases.

§ 1123. Same subject; English and Australian cases. The measure of damages in trespass, trover or replevin for the loss of property is generally the same as that which a vendee, who has paid therefor, is entitled to recover against a vendor for its non-delivery. The rule applied in one such action is cited freely in the others. The English cases make a difference between vendor and purchaser when the vendee has paid the price in advance. Therefore, the rule is the same for a conversion of the plaintiff's stock, and where he sues for a breach of a contract to replace stock or for non-delivery of stock contracted and paid for its value at the time of the trial,[2] if the price has advanced, measures the damages; otherwise he will be entitled to its value at the time of the conversion.[3] It has there

Philadelphia, etc. R., 153 Pa. 160, 25 Atl. Rep. 1043.

[1] Maynard v. Pease, 99 Mass. 555. See § 1112.

[2] Shepherd v. Johnson, 2 East, 211; McArthur v. Seaforth, 2 Taunt. 257; Harrison v. Harrison, 1 C. & P. 412; Shaw v. Holland, 15 M. & W. 145; Owen v. Routh, 14 C. B. 327.

[3] Forest v. Elwes, 4 Ves. 492; Sanders v. Kentish, 8 T. R. 161; In re Baha, etc. R. Co., L. R. 3 Q. B. 584.

In Michael v. Hart, [1902] 1 K. B. 482 (in the court of appeal), the defendants, who were stock brokers, agreed with the plaintiff to carry over to the end of May account on the stock exchange certain stocks which they had purchased for him, and made the necessary arrangements with jobbers for that purpose. Before the settling day arrived they closed the plaintiff's account without instructions by selling the stocks. Plaintiff gave notice that he should insist on performance by them of the contract when the settling day arrived. At the time of closing the account the prices of the stocks were falling, but shortly afterwards they rose, and they were higher at the end of the May settlement, having been still higher during the interval between the closing of the account and the end of May settlement. In an action brought after the end of that settlement for non-performance of the contract to carry over the stocks, it was held that the plaintiff was entitled to insist on performance of the contract at the end of May settlement, and to measure his damages with reference to the prices of the stocks at that date. Owing to a compromise made between the parties the court did not find it necessary to decide whether the plaintiff had a right to have the damages es-

been held that where a bond is given by the borrower of a share of stock to secure its replacement, and payment in the meantime of a sum equal to the interest and dividends, and a bonus is afterwards declared upon the stock, the lender has an equity to be placed in the same situation as if it had remained in his hands and is consequently entitled to the replacement of the original stock increased by the amount of the bonus, and to the dividends in the meantime as well upon the bonus as upon such stock.[1] This is a reasonable measure of damages on the footing of the English ventures in stock as an investment; but affords no support to the rule of the highest intermediate value which is not maintained to the time of the trial.[2]

In a late case against the directors of a company who had improperly allotted to themselves a large number of shares at less than their value, they were required to account to the company for the profits derived from the sale of such shares thus allotted as they had disposed of; as to the shares retained, the proper measure of damages was, not the highest price at which any shares of the company had been sold during the period for which the directors had held their shares, but the market value of the shares at the dates at which they were respectively allotted, the directors being required to pay to the company the excess (if any) of that market value above the sums which they had paid for the shares. The right to recover the highest intermediate market value of the shares was urged on the authority of Eden v. Risdale's Railway Lamp and Lighting Co.,[3] in which the court of appeal ruled that a gift by a promoter of a company to a director whilst there are any questions open between the company and the promoter must be accounted for by the director to the company, and the latter may claim the thing given or its highest value while held by the director. The grounds of the judgment in the principal case are indicated in the opinion of Collins, L. J., who

timated on the basis of the highest prices at which the stocks had stood in the interval between the closing of the account and the end of May. The affirmative of that proposition was held in the court below. [1901] 2 K. B. 867.

[1] Vaughan v. Wood, 1 M. & K. 403.

[2] Williams v. Peel River, etc. Co., 55 L. T. Rep. 689; Simmons v. London Joint Stock Bank, [1891] 1 Ch. 270; Earl of Sheffield v. Same, 13 App. Cas. 333; In re Waters, 5 N. Z. L. R. (Sup. Ct.) 431.

[3] 23 Q. B. Div. 368 (1889).

agreed with Webster, M. R., and Rigby, L. J.: The market value is merely a piece of machinery to ascertain the value of the thing. When there is a real market for the thing, the market price determines its value. The principle would be precisely the same whether there was a market for it or none at all. That which would have to be accounted for would be the highest value of the thing wrongfully taken. When there is a real market, in which the things in question can to any amount be exchanged and sold for money, there is a short cut to the value to take the market price. But when these conditions do not exist, it is not a short cut to the value to take the price at which isolated lots could on given dates be sold. You would practically be applying to the shares a value which did not exist — a market value when in truth and in fact there was not a real market at all. The learned judge has found in effect that the value claimed was not the market value, because he said that if these shares had been put into the market in any quantity they could not have been sold at all. Under the circumstances, it would be very unfair to take what is an artificial and fictitious standard of value as the true value of the shares. I think that the time at which the damages are to be ascertained may be fairly taken as the time at which the wrong was done. The action is for damages, and in the present case I think it is exactly analogous to the common-law action for conversion.[1] This rule of damages has been applied in Victoria in a very similar case, though it was not distinguished by the fact that there was no market value for the stock. The allowance of interest on the value of the stock was a matter in the discretion of the court.[2] In another English case of the same nature the rule of highest intermediate value has been applied; the only distinction appearing is that there was a market value for the shares.[3] In yet another, which was brought under the Companies Act, 1862, the shares were taken to be of their nominal value.[4]

In Victoria a plaintiff whose stock has been converted may

[1] Shaw v. Holland, [1900] 2 Ch. 305.

[2] Montgomerie's Brewery Co. v. Blyth, 26 Vict. L. R. 612.

[3] Nant-y-glo & Blania Ironworks Co. v. Grave, 12 Ch. Div. 738; In re Morvah Consols Tin Mining Co., 2 id. 1.

[4] In re Caerphilly Colliery Co., 5 Ch. Div. 336.

recover its value at the date either of the institution of suit or of the decree, at his option.[1] In a later case in which an improper exercise of the mortgagee's power of sale was complained of, the court considered that elements of trust and of contract were involved, and that, therefore, the adoption of a different measure of damages than governed in ordinary actions for conversion was demanded. It not appearing that the plaintiff had delayed bringing suit in order that his recovery might be augmented, his damages were assessed as of the time the writ issued.[2] A subsequent case was brought to recover for the non-delivery of scrip, and the plaintiff had the choice of market value at the time of the breach of contract or such value at the time of the trial.[3] Where the action was for the unauthorized forfeiture of shares, followed by their sale, and the plaintiff demanded their recovery, or, in the alternative, damages, he was held entitled to recover the shares if they could be procured, notwithstanding their very large increase in value; that failing, he was entitled to their value at the time of forfeiture.[4] In New Zealand the value of property which has increased in value intermediate the wrong and the trial of the action may be proved as of a time subsequent to the conversion.[5]

§ 1124. Same subject; rule in North Carolina. The rule in North Carolina is peculiar. The value at the trial is the measure of damage, and though the property may have suffered injury or deterioration, the defendant has the option to surrender it, and damages may be assessed for the detention, including compensation for the diminution of value.[6]

§ 1125. Departure from general rule sometimes justifiable. The general rule may safely and justly be departed from [508] or supplemented when it fails to furnish adequate compensation for the entire injury; as if there be a subsequent increase in price, which the plaintiff would have, or which the defendant has, obtained.[7] And if he has the property in his posses-

[1] Hicks v. Commercial Bank, 5 Vict. L. R. (eq.) 228.

[2] Amoretty v. City of Melbourne Bank, 13 Vict. L. R. 431, approving Owen v. Routh and Shepherd v. Johnson, *supra*.

[3] Vicary v. Foley, 17 Vict. L. R. 407.

[4] Haddow v. Duke Co., 18 Vict. L. R. 155.

[5] Kohai v. Macdonald, 9 N. Z. L. R. 221.

[6] Boylston Ins. Co. v. Davis, 70 N. C. 485.

[7] Symes v. Oliver, 13 Mich. 9;

sion at the time of the trial there is no injustice in compelling him to pay what it is worth at that time.[1] The subject of special and consequential damages will be considered further on.

§ 1126. Recovery where value of property enhanced by defendant. If the wrong-doer takes property in one condition and by bestowing labor upon it puts it in a better condition, and thus makes it more valuable, is he chargeable in an action for its conversion with the improved value? The general rule in trover — the value at the time and place of conversion, with interest — would exclude any such question by the very logic of the remedy. But under the more flexible rule of reaching the real equity of the particular case or under the rule of giving the highest intermediate value, this has often been a grave practical question. The improved value is recoverable in some states upon general principles, and in others, to some extent, by statute. Thus where timber has been taken and converted into wood; wood into coal; logs into lumber; corn into whisky, or the like, the value in the latest and most improved form has been recovered.[2] As against trespassers upon gov-

Ewart v. Kerr, 2 McMull. 141; De Clerq v. Mungin, 46 Ill. 112; Ingram v. Rankin, 47 Wis. 406, 420, 2 N. W. Rep. 755, 32 Am. Rep. 762.

[1] Ingram v. Rankin, *supra*.

[2] Betts v. Lee, 5 Johns. 348; Curtis v. Groat, 6 id. 168; Brown v. Sax, 7 Cow. 95; Riddle v. Driver, 12 Ala. 590; Walther v. Wetmore, 1 E. D. Smith, 7; Silsbury v. McCoon, 3 N. Y. 379, 6 Hill, 425, 41 Am. Dec. 753, 4 Denio, 332; Babcock v. Gill, 10 Johns. 287; Nesbitt v. St. Paul Lumber Co., 21 Minn. 491; Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189; Symes v. Oliver, 13 Mich. 9; Final v. Backus, 18 id. 218; Snyder v. Vaux, 2 Rawle, 423, 21 Am. Dec. 466; Millar v. Humphries, 2 A. K. Marsh. 446; Smith v. Gonder, 22 Ga. 353; Baker v. Wheeler, 8 Wend. 505; Davis v. Easley, 13 Ill. 192; Eastman v. Harris, 4 La. Ann. 103; Everson v. Seller, 105 Ind. 266, 4 N. E. Rep. 854; Shepard v. Pettit, 30 Minn. 481, 16 N. W. Rep. 271; Baker v. Hart, 52 Hun, 363, 5 N. Y. Supp. 345; Guchenheimer v. Angewine, 81 N. Y. 397; Benson Mining & S. Co. v. Alta Mining & S. Co., 145 U. S. 428, 12 Sup. Ct. Rep. 877; Powers v. Tilley, 87 Me. 34, 32 Atl. Rep. 714, 47 Am. St. 304; Wing v. Milliken, 91 Me. 387, 40 Atl. Rep. 138, 64 Am. St. 238; Missouri, etc. R. Co. v. Starr, 22 Tex. Civ. App. 353, 55 S. W. Rep. 393; Whiting v. Adams, 66 Vt. 679, 30 Atl. Rep. 32, 44 Am. St. 875; Genet v. Delaware & H. Canal Co., 14 App. Div. 177, 43 N. Y. Supp. 589. See § 1020.

In Walther v. Wetmore, 1 E. D. Smith, 7, it is held that because the owner does not lose title to the property by the wrong-doer improving it, and may retake or replevy it, he is entitled to recover the improved value in trover. Grant v. Smith, 26 Mich. 201; Moret v. Mason, 106 Mich. 340, 64 N. W. Rep. 193, distinguishing Winchester v. Craig, 33 Mich. 205, on

ernment land who wilfully convert timber thereon the rule of damages is the full value of the property at the time and place of demanding it in the condition it then is.[1] The measure of liability of an innocent purchaser is the value of the property at the time the purchase was made. If the defendant is an innocent trespasser or purchaser without notice from him, the recovery is limited to the value of the property at the time it was converted,[2] without deduction on account of the increase of value resulting from the acts of the trespasser.[3]

In a case where an innocent purchaser from a wilful trespasser, in anticipation of an absolute purchase and on the faith of a good title to the property in his vendor, advanced money to be expended in improving its value, and to be credited on account of the purchase-money, when the property should be delivered in its improved condition, and took from the vendor a transfer of title to the property in its unimproved condition, pending the completion of the contract, to secure the advances made, the damages were to be estimated as of the time when the first advances were made by such purchaser. "The rule which forfeits to the owner the added value conferred by the labor and money of the trespasser is a punitive one, and should not be made to apply to the innocent purchaser where it can be avoided. In the Wooden-ware Co. case it could not be avoided, because when the purchaser paid his money to his vendor that which he bought belonged, increased value and all, to the person from whom it had been tortiously taken. In this case, however, the defendants advanced money for the very purpose of giving the property added value, when it was still in the shape of logs, and secured a transfer of title at that time. We think justice requires that we should treat the case

the ground that in the latter case the timber was cut by mistake; Saltmarsh v. Chicago, etc. R. Co., 122 Mich. 103, 80 N. W. Rep. 981; Hendricks v. Evans, 46 Mo. App. 313 (improved condition of live animals).

[1] Wooden-ware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. Rep. 398; Bly v. Same, 4 Dill. 466. See United States v. Mills, 9 Fed. Rep. 684; Schulenberg v. Harriman, 21 Wall. 44, 2 Dill. 398.

[2] Wooden-ware Co. v. United States, *supra;* Potter v. United States, — C. C. A. —, 122 Fed. Rep. 49; Penfield v. Sage, 71 Hun, 573, 24 N. Y. Supp. 994; Hastay v. Bonness, 84 Minn. 120, 86 N. W. Rep. 896.

[3] Central Coal & C. Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S. W. Rep. 49.

as if the purchase had taken place when the logs were on the skids, and the accession in value had been the result of the defendant's expenditure thereafter."[1] Where a tenant in common was fraudulently deprived of his interest in an oil leasehold by his co-tenant he was entitled to recover the value of his share of the oil produced and converted by the latter as it stood in the tank, without charge for the expense of producing it.[2]

[510] **§ 1127. Same subject.** In Indiana a crop of wheat was wrongfully taken, harvested and threshed; and the wrong-[511] doer was held liable for it at the highest market price between the taking and the sale made by him, without any [512] abatement or allowance for harvesting and threshing.[3] Similar rulings have been made in other states.[4] In such cases the plaintiff, by his recovery, is placed in a better situation than he would be in if the wrong had not been committed. He is not entitled to recover this increase of value as a necessary part of a perfect compensation for the loss and injury which he suffered. It is said that a wrong-doer cannot acquire title to another's property by improving it. As a general proposition this is true; but the principle does not apply when the owner sues for a conversion and asks damages therefor. The injury then to be compensated is not affected at all by the use which the defendant has subsequently made of the property. When found guilty of the conversion and the defendant pays the damages assessed, the law vests him with the title as of that date. By bringing such an action the owner tacitly assents to this result.[5] Instead of the value added by the defendant, the value at the time and place of the conversion with interest is the rule founded in sound principle and now supported by a decided preponderance of authority. Maule, J., said upon this point:[6] "It may be that the wrong-doer who acquires no property in the chattel he converts acquires no lien for what he expends on it, and the owner may bring det-

[1] Fisher v. Brown, 70 Fed. Rep. 570, 17 C. C. A. 225.

[2] Foster v. Weaver, 118 Pa. 42, 12 Atl. Rep. 313, 4 Am. St. 573.

[3] Ellis v. Wire, 33 Ind. 127, 5 Am. Rep. 189, approved in Everson v. Seller, 105 Ind. 266, 271, 4 N. E. Rep. 854.

[4] Stuart v. Phelps, 39 Iowa, 14; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384. *Contra*, Boutwell v. Harriman, 58 Vt. 516, 2 Atl. Rep. 159.

[5] § 1108.

[6] Reid v. Fairbanks, 13 C. B. 692.

inue or trover. But it does not follow that if the owner brings trover he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is the amount of the pecuniary loss the plaintiffs have sustained by the conversion." Where the chattel has become such by an unintentional tortious severance from the realty, as where coal or minerals are taken from a mine, or timber or fixtures from the freehold, the general rule is to allow the value immediately after the severance and when the property first becomes a chattel.[1] In the two California cases just cited the

[1] Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239; Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 Q. B. 278; Maye v. Tappan, 23 Cal. 306; Goller v. Fett, 30 id. 481; Single v. Schneider, 24 Wis. 301, 30 id. 570; Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151; Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Tilden v. Johnson, 52 Vt. 628; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Winchester v. Craig, 33 Mich. 205; Firmin v. Firmin, 9 Hun, 571; McLean County Coal Co. v. Long, 81 Ill. 359; Kier v. Peterson, 41 Pa. 357; Heard v. James, 49 Miss. 236; Young v. Lloyd, 65 Pa. 199; Lyon v. Gormley, 53 id. 261; Clarke v. Holford, 2 C. & K. 540; Bennett v. Thompson, 13 Ired. 146; Smith v. Gonder, 22 Ga. 353; Wood v. Morewood, 3 Q. B. 440, note; Cushing v. Longfellow, 26 Me. 306; United States v. Magoon, 3 McLean, 171; Greeley v. Stilson, 27 Mich. 154; Tome v. Dubois, 6 Wall. 548; Potter v. Mardre, 74 N. C. 36; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; Omaha & G. S. & R. R. Co. v. Tabor, 13 Colo. 41, 56, 21 Pac. Rep. 925, 16 Am. St. 185, 5 L. R. A. 236; Ayres v. Hubbard, 57 Mich. 322, 23 N. W. Rep. 829, 58 Am. Rep. 361, 71 Mich. 594, 40 N. W. Rep. 10; Beede v. Lamprey, 64 N. H. 510, 15 Atl. Rep. 133, 10 Am. St. 426; Railroad Co. v. Hutchins, 37 Ohio St. 282; White v. Yawkey, 108 Ala. 270, 19 So. Rep. 360, 54 Am. St. 159, 32 L. R. A. 199 (if the trespass was unintentional); Ragland v. Taylor, 7 Ky. L. Rep. 163 (the value of trees as they stood in the forest); Carpenter v. Lingenfelter, 42 Neb. 728, 60 N. W. Rep. 1022, 32 L. R. A. 422; Durant Mining Co. v. Percy Consolidated Mining Co., 93 Fed. Rep. 166, 35 C. C. A. 252; Dyke v. National Transit Co., 22 App. Div. 360, 49 N. Y. Supp. 180; Colorado Central Consolidated Mining Co. v. Turck, 70 Fed. Rep. 294, 17 C. C. A. 128; Ivy Coal & C. Co. v. Alabama Coal & C. Co., 135 Ala. 579, 33 So. Rep. 547; Dolliff v. Robbins, 83 Minn. 498, 86 N. W. Rep. 772; Livingston v. Rawyards Coal Co., L. R. 5 App. Cas. 25. It was formerly the rule in England that the value of coal immediately after its severance might be recovered. Martin v. Porter, 5 M. & W. 351. See Gates v. Rifle Boom Co., 70 Mich. 309, 38 N. W. Rep. 245, and §§ 1019, 1020.

The rule was formerly to the contrary in Minnesota; but in a late case the court, without unqualifiedly accepting the doctrine of the text, holds that it should be applied whenever the act is not intentionally or grossly wrongful. Viliski v. Minneapolis, 40 Minn. 304, 3 L. R. A. 831, 41 N. W. Rep. 1050; Whitney v. Huntington, 37 Minn. 197, 33 N. W. Rep. 561.

[513] action was for *mesne* profits or for injury to land, and the rule of damages applied was the value of the gold dust, less the expense of its extraction. In Maye v. Tappan the court say the rule of damages depends to some extent upon the form of the action; whether it is for an injury to the land itself or for conversion of a chattel severed therefrom. In that case the action was for injury to the land. The same rule was laid down in Clowser v. Joplin Mining Co.[1] In Pennsylvania, Wisconsin and the federal court for Massachusetts the same rule has been applied in trover.[2] In Forsyth v. Wells it was held that the rule of the value after severance would transfer to the plaintiff all the defendant's labor in mining the coal which was the subject of the action and thus give the plaintiff more than compensation for the injury done; and the court discuss the relation of the rule of damages to the form of action.[3]

§ 1128. Same subject. Where the plaintiff's timber standing was worth $1.50 per thousand feet, and an expense of $9 was incurred by the defendant in wrongfully cutting it into logs and transporting them to a distant market where they were worth $12 per thousand, the owner was held entitled in trover to recover the value when taken, that is the "stumpage" value in the ordinary market; or the value at the place where it was marketed less the sums expended in the cutting and transportation in thus putting the property in condition for sale, with interest from the date of conversion.[4] The value of property converted may be and often is enhanced by transportation. This increase of value is no just cause for an increase of dam-

[1] 4 Dill. 469, note.

[2] Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617; Single v. Schneider, 30 Wis. 570, 24 id. 299; Hungerford v. Redford, 29 id. 345; Ghen v. Rich, 8 Fed. Rep. 159.

[3] In Lyon v. Gormley, 53 Pa. 265, Strong, J., commenting on Forsyth v. Wells, used this language: "The decision was made by a bare majority of the court, and it is to be regarded as ruling nothing more than the law as applicable to the circumstances of that case. There the coal had been taken under a mistake of right, and the act complained of was substantially a trespass. It was a case for compensation, and though it was held trover would lie, the action was treated as an action *quare clausum fregit* for an injury not wanton." The rule and principle of Forsyth v. Wells has been followed in Herdic v. Young, 55 Pa. 176, 93 Am. Dec. 739; Coleman's Appeal, 62 Pa. 278; Young v. Lloyd, 65 id. 199.

[4] Winchester v. Craig, 33 Mich. 205.

ages to the owner; for it is no additional element in his pecuniary loss. He is, therefore, by the prevailing course of decision, allowed only the value at the place as well as time of conversion.[1] Where a conditional sale of cloths was made, and the purchaser printed them but did not perfect his purchase, in trover brought by the seller against one to whom the conditional vendee had consigned the cloths to be sold, it was held the plaintiff could recover in damages only their value at the time they were delivered, not their value after they were printed.[2] In trover for the conversion of a vessel which was taken in an unfinished state and completed by the defend- [517] ant, it was held, in an action by the purchaser at a sale under execution levied while it was in the unfinished state in which the defendant took it, that the plaintiff was entitled only to the value at the time of the levy.[3] And a similar rule was applied in England. The plaintiff had a bill of sale of a ship being built to secure advances. The defendant converted her before she was finished and afterwards completed her. The plaintiff was held entitled to her value at the time of the conversion, not at a subsequent time; and he was not entitled to special damages for loss of freight she might have earned.[4]

This principle, which confines the plaintiff's recovery to compensation for his actual loss and therefore to the value of his property at the time of conversion, applies when its identity is destroyed by a wrongful intermixture with other property, producing what is commonly called a *confusion of goods*. If the owner chooses to seek his remedy by an action for the conver-

[1] Weymouth v. Chicago, etc. R. Co., 17 Wis. 550, 84 Am. Dec. 763; Saunders v. Clark, 106 Mass. 331; Herdic v. Young, *supra;* Tilden v. Johnson, 52 Vt. 628; Ayers v. Hubbard, 57 Mich. 322, 23 N. W. Rep. 829, 58 Am. Rep. 361; Beede v. Lamprey, 64 N. H. 510, 15 Atl. Rep. 133, 10 Am. St. 426. *Contra*, Baker v. Hart, 52 Hun, 363, 5 N. Y. Supp. 345; Hilliard Flume Co. v. Woods, 1 Wyo. 396.

[2] Dresser Manuf. Co. v. Waterston, 3 Met. 9; Aborn v. Mason, 14 Blatch. 405.

[3] Green v. Hall, 1 Houst. 506.

[4] Reid v. Fairbanks, 13 C. B. 692.

Where property was improved by the party who first converted it and sold thereafter by him, it was held that the betterments were wrongfully made, that the title thereto was in the owner, and the purchaser from the wrong-doer was liable for the value of the property at the time and place when and where he became such. There was no question in the case as to the damages recoverable from the vendee being in excess of the amount for which the original wrong-doer was liable. Glaspy v. Cabot, 135 Mass. 435.

sion of his goods, he is fully compensated when he recovers their value at the time of such a conversion, as when it occurs in any other manner. By the general current of authority he is confined to that measure of redress.[1] But where this rule of strict compensation in this class of cases does not prevail, and the improved article may be taken after it has been enhanced in value by the wrong-doer, the right of the owner to the entire property of which his goods have become a part by a wrongful admixture is recognized and enforced.[2] The cases which administer the mitigated rule, exempting the wrong-doer from paying the owner the enhanced value caused by his labor, or the loss of his property by its admixture with that of another, confine it to the case of conversion by mistake or in [518] the *bona fide* assertion of his rights.[3] But there are intimations in several cases that the value of the original property should be given as the measure of compensation without regard to the wrong having been done wilfully or fraudulently.[4] One who fails to use ordinary care to ascertain the boundary

[1] Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239; per Campbell, J., in Stephenson v. Little, 10 Mich. 433; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; Potter v. Mardre, 74 N. C. 36; Baker v. Meisch, 29 Neb. 227, 45 N. W. Rep. 685; Carpenter v. Lingenfelter, 42 Neb. 728, 60 N. W. Rep. 1022, 32 L. R. A. 422. See Single v. Schneider, 30 Wis. 570; Ryder v. Hathaway, 21 Pick. 298.

[2] Rice v. Hollenbeck, 19 Barb. 664; Walther v. Wetmore, 1 E. D. Smith, 7; Silsbury v. McCoon, 6 Hill, 425, 41 Am. Dec. 753, 4 Denio, 332; Isle Royale Mining Co. v. Hertin, 37 Mich. 332; Burnham v. Marshall, 56 Vt. 365; Strubbee v. Trustees Cincinnati R., 78 Ky. 481, 39 Am. Rep. 251.

[3] Heard v. James, 49 Miss. 236; Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617; Whitney v. Huntington, 37 Minn. 197, 33 N. W. Rep. 561; Viliski v. Minneapolis, 40 Minn. 304, 41 N. W. Rep. 1050, 3 L. R. A. 831; Hoxsie v. Empire Lumber Co., 41 Minn. 548, 43 N. W. Rep. 476; Railroad Co. v. Hutchins, 37 Ohio St. 282; Wooden-ware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. Rep. 398; Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S. W. Rep. 881; White v. Yawkey, 108 Ala. 270, 19 So. Rep. 360, 54 Am. St. 159, 32 L. R. A. 199; Durant Mining Co. v. Percy Consolidated Mining Co., 93 Fed. Rep. 166, 35 C. C. A. 252; Golden Reward Mining Co. v. Buxton Mining Co., 97 Fed. Rep. 413, 38 C. C. A. 228, 237; Dyke v. National Transit Co., 22 App. Div. 360, 49 N. Y. Supp. 180; Colorado Central Consolidated Mining Co. v. Turck, 70 Fed. Rep. 294, 17 C. C. A. 128.

In New Hampshire the rule is extended to cases where the wrong is done carelessly, but not wilfully. Beede v. Lamprey, 64 N. H. 510, 15 Atl. Rep. 133, 10 Am. St. 426.

[4] Single v. Schneider, 30 Wis. 570; Potter v. Mardre, 74 N. C. 36; Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239; Carpenter v. Lingenfelter, *supra*. See § 103.

line between his land and that on which he enters may be found to be an intentional trespasser, and to be subject to the severer rule of damages.[1] Cases may well arise in which the circumstances may be such that the increased value resulting to property from the labor of the wrong-doer may not be of any practical advantage to its owner, as where he could have performed it without expense or loss if the conversion had not deprived him of the opportunity of doing so. In such a case no deduction should be made in behalf of the defendant.[2] In all cases the party who seeks to retain the advantage of his labor by deducting from the damages sought by the plaintiff the value thereby added to the latter's property must show the amount of such increased value, or he will be charged with the worth of the property in its improved state.[3] As a concluding objection to the allowance of anything but strictly compensatory damages in the action of trover, it may be said that anything beyond that, if it is imposed upon the defendant because of his bad motive, is in the nature of vindictive damages, and it is exceptional for the court, instead of the jury, to award them as matter of law and of right.[4]

§ 1129. Special or consequential damages. In England, and generally in this country, special damages are recoverable in this action if alleged in the declaration.[5] In trover for a horse valued at 15*l.*, special damage was claimed for the hire of another. There was some hesitation in recognizing the damage as recoverable, and a compromise result followed in a judgment for 25*l.*[6] Where a carpenter's tools were the sub-

[1] Durant Mining Co. v. Percy Consolidated Mining Co., *supra*. See § 1020.

[2] Taber v. Jenny, 1 Sprague, 315.

[3] Steele v. United States, 19 Ct. of Cls. 181.

[4] See Heard v. James, 49 Miss. 236.

[5] Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. Rep. 778, disapproving Collins v. Lowry, 78 Wis. 329, 47 N. W. Rep. 612; Blewett v. Miller, 131 Cal. 149, 63 Pac. Rep. 157.

[6] See Hughes v. Quentin, 8 C. & P. 703; Barrow v. Arnaud, 8 Q. B. 595; Saunders v. Brosius, 52 Mo. 50; Boylan v. Huguet, 8 Nev. 345.

In a Georgia case cotton was purchased from a warehouseman and while in his possession was resold, and delivery was impossible. In settling the accounts between him and the owner equity compelled the warehouseman to pay the amount the owner was obliged to pay his vendee on account of his inability to fulfill his contract, which was the difference between the price the cotton was then worth and the price at which it had been sold. Beall v. Rust, 68 Ga. 744.

ject of the suit the court allowed special damages by reason of the plaintiff, a carpenter, being prevented, in consequence, from working at his trade.[1] In a subsequent case[2] the court of queen's bench drew a distinction between special damage and special value, and said they were inclined to think that to enable a plaintiff to recover special damage which did not form part of the actual present value of the goods, as in withholding the tools of a man's trade, the defendant must have some notice of the inconvenience likely to be occasioned.[3] In a Texas case exempt tools and apparatus were levied upon and sold. The plaintiff sought to recover for the loss of labor put upon material which was to be used in filling a contract he had entered into, and which material, in consequence of the sale, he was unable to complete. Because the officer knew nothing of such contract a recovery of lost profits was denied.[4] If property was not in use at the time it was taken and could not be used until after expiration of ample time to replace it, damages are not recoverable because of the deprivation of the use.[5] Where the defendant, in an attempt to collect a debt, forcibly and against the remonstrance of the plaintiff, entered her house while she was disrobed, seized a check, demanded that she indorse it, and took it away, the latter was considered the *gravamen* of the action, and the other matters were merely in aggravation of the damages. The facts made the case one for awarding compensation for mental suffering, and, also, for punitive damages.[6] It has been held that if the goods have been returned after conversion, and accepted by the plaintiff,

[1] Bodley v. Reynolds, 8 Q. B. 779; Reilley v. McMinn, 2 Pugsley (N. B.), 370.

[2] France v. Gaudet, L. R. 6 Q. B. 199.

[3] In trover against an officer for seizing the tools of one's trade damages for breaking up the plaintiff's business are not recoverable where that results from the award of the property in an action of replevin to the defendant in the action of trover. McGuire v. Galligan, 57 Mich. 38, 23 N. W. Rep. 479.

Anticipated profits from fulfilling existing contracts for threshing grain are subject to too many contingencies to be made the basis of damages for the conversion of a machine necessary to be used in doing so. Cushing v. Seymour, 30 Minn. 310, 15 N. W. Rep. 249, followed in Williams v. Wood, 55 Minn. 323, 56 N. W. Rep. 1066.

[4] McKnight v. Carmichael, 7 Tex. Civ. App. 270, 27 S. W. Rep. 150.

[5] Woods v. Gaar, Scott & Co., 93 Mich. 143, 53 N. W. Rep. 14.

[6] Bonelli v. Bowen, 70 Miss. 142, 11 So. Rep. 791.

he can only recover a nominal sum unless he claims special damages and alleges them in his declaration.[1] Such return accepted is treated as if ordered by the court; and therefore, in the absence of allegations in the declaration or conditions agreed on at the acceptance, the latter is deemed an admission that the property has been returned in the same plight as when converted and that no special damages have been suf- [519] fered, for only in such a case would the court stay proceedings on return of the property.[2] In Pennsylvania such damages are not regarded as special.[3] In allowing proof that the defendant's detention prevented the sale of the property when the market was high, and that the plaintiff was injured by the subsequent decline, the court thus stated what is believed to be the theory of the American practice on this point: [520] "The redelivery is the defense, and is evidence for the defendant, not in bar of the action but in mitigation of the damages; and the plaintiff in reply may surely present to the consider ation of the jury the actual injury resulting to him from the trover or conversion, in order to show to what extent the damage should in justice be mitigated."[4] One who innocently buys stolen property from a thief is liable to the owner for its value. If any of it is returned to the owner the wrong-doer's liability is mitigated to that extent. If the owner has incurred expense in recovering possession of his property, as by bringing replevin suits against purchasers of it from the defendant, the latter is liable for such expense, including traveling expenses and attorney's fees.[5] If the completion of a house erected to be rented is delayed as the result of converting articles of plumbing therein, there may be a recovery of the rent lost.[6] Any damages claimed in addition to the value and interest are necessarily special and must be alleged.[7] But the

[1] Barrelett v. Bellgard, 71 Ill. 280; Moon v. Raphael, 2 Bing. N. C. 310.

[2] See § 1144. In Moon v. Raphael, *supra*, the defendant, a sheriff, who held goods taken in execution, delivered them to plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them; the plaintiff accepted the goods without condition; held, that they could not recover in the action more than nominal damages; at all events not without alleging special damages in the declaration.

[3] Rank v. Rank, 5 Pa. 211.

[4] See § 1139.

[5] Laughlin v. Barnes, 76 Mo. App. 258.

[6] Munroe v. Armstrong, 179 Mass. 165, 60 N. E. Rep. 475.

[7] § 419; Summers v. Heard, 66 Ark. 550, 562, 50 S. W. Rep. 78, 51 id. 1057;

compensation the plaintiff may be entitled to in place of the value by reason of a return of the goods is not of this nature.

Loss of profits resulting from the conversion of a stock of goods cannot be recovered for as compensatory damages.[1] In Nebraska the contrary rule is well established.[2] It has been ruled by the New York supreme court, appellate term, that ordinarily where conversion is brought for the taking and removal of a stock in trade by a sheriff, the value of the goods is the damage allowed; but if the action be for the trespass as well as for the conversion, as alleged in this complaint, which was for ejecting the plaintiff from her business and breaking up and destroying it, and depriving her of the use, benefit and profits of it, as well as for the taking of the goods, and detaining them, the loss of profits while the plaintiff was so deprived is unquestionably a direct damage, as in every case of trespass which interferes with the trade or business carried on in the premises.[3] An insolvent cannot recover damages for injury to his commercial standing,[4] nor can one who has voluntarily gone out of the mercantile business, though he may have intended to resume it.[5] Evidence as to the plaintiff's reputation and financial standing is inadmissible.[6] One from whom cows have been taken cannot recover for the loss of their calves and the milk which the cows might have subsequently produced.[7] An officer who has wrongfully seized and retained property is not liable for its loss by fire unless his wrongful act exposed it thereto, or it occurred through his negligence.[8] Depreciation in the value of property converted is an element

Fish v. Nethercutt, 14 Wash. 582, 45 Pac. Rep. 44, 53 Am. St. 892.

[1] Miller v. Jannett, 63 Tex. 82; Anderson v. Sloane, 72 Wis. 566, 40 N. W. Rep. 214, 7 Am. St. 885; § 1102; Summers v. Heard, *supra;* Montignam v. E. V. Crandall Co., 34 App. Div. 228, 54 N. Y. Supp. 517; Wehle v. Haviland, 69 N. Y. 448; Moravec v. Grell, 78 App. Div. 146, 79 N. Y. Supp. 533.

[2] Haverly v. Elliott, 39 Neb. 201, 206, 57 N. W. Rep. 1010; Kyd v. Cook, 56 Neb. 71, 76 N. W. Rep. 524, 71 Am. St. 661.

[3] Ebenreiter v. Dahlman, 19 N. Y. Misc. 9, 42 N. Y. Supp. 867, affirming s. c., 18 N. Y. Misc. 351, 41 N. Y. Supp. 559, and citing Schile v. Brokhahus, 80 N. Y. 614.

[4] Roby v. Meyer, 84 Tex. 386, 19 S. W. Rep. 557.

[5] R. F. Scott Grocer Co. v. Kelly, 14 Tex. Civ. App. 136, 36 S. W. Rep. 140.

[6] Downing v. Outerbridge, 79 Fed. Rep. 931, 25 C. C. A. 244.

[7] Drennen v. Charles, 12 Pa. Super. Ct. 476.

[8] Norris v. McCanna, 29 Fed. Rep. 757.

of damage if the defendant is the cause thereof.[1] The plaintiff cannot recover for his time in attending court on the trial of an action involving the validity of the seizure of his property, nor for any other such incidental expense.[2] The expenses of the plaintiff in an action of trover are only recoverable where he actually becomes repossessed of the property, and that fact is pleaded in mitigation of the damages.[3] Expenditures on account of rent may be recovered if the wrong-doer took possession of the premises.[4]

§ 1130. Attorney's fees. In Alabama and Texas counsel fees incurred and paid in prosecuting an action of trover cannot be recovered.[5] But they have been allowed in Ohio against an agent in favor of his principal,[6] and in New York.[7] The California code provides that the damages recoverable for a conversion shall include a fair compensation for the time and money properly expended in pursuit of the property. This authorized the recovery of reasonable attorney's fees expended by the plaintiff in recovering a large part of a sum of money obtained from him through the fraud of the defendant's agent, for which fraud the defendant was liable.[8] In Georgia counsel fees are not recoverable unless the defendant has acted in bad faith or has been stubbornly litigious.[9]

§ 1131. Exemplary damages. In jurisdictions in which exemplary damages are allowed they are generally recoverable in all actions of tort where the wrong which is the gist of the action is committed wilfully or maliciously — is attended with the aggravations which are treated as sufficient ground in trespass to justify such damages.[10] An officer who acts under

[1] Proctor v. Irvin, 22 Mont. 547, 57 Pac. Rep. 183. See Rambaut v. Irving Nat. Bank, 42 App. Div. 143, 58 N. Y. Supp. 1056.

[2] Harris v. Finberg, 46 Tex. 79, 90.

[3] United States v. Pine River Logging & Imp. Co., 89 Fed. Rep. 907, 32 C. C. A. 406.

[4] Casey v. Ballou Banking Co., 98 Iowa, 107, 67 N. W. Rep. 98.

[5] Renfro's Adm'x v. Hughes, 69 Ala. 581; Lee v. McDonnell, 72 S. W. Rep. 612 (Tex. Ct. of Civ. App.).

[6] Peckham Iron Co. v. Harper, 41 Ohio St. 100, 108.

[7] Hynes v. Patterson, 95 N. Y. 1. See Bishop v. Hendrick, 82 Hun, 323, 31 N. Y. Supp. 502, affirmed without opinion, 146 N. Y. 398; Rambaut v. Irving Nat. Bank, 42 App. Div. 143, 58 N. Y. Supp. 1056.

[8] Bank of Palo Alto v. Pacific Postal Tel. Cable Co., 103 Fed. Rep. 841; McDonald v. McConkey, 57 Cal. 325; Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. Rep. 12.

[9] Buckner v. State, — Ga. —, 41 S. E. Rep. 583.

[10] Pribble v. Kent, 10 Ind. 325, 71 Am. Dec. 327; Forsyth v. Wells, 41

process may be and usually is exempted from liability for punitive damages; but that result does not follow in favor of the plaintiff in the process who wrongfully procured it and used it for the purpose of obtaining possession of property not his own.[1] In trover, where property has been tortiously taken, the taking is not the gist of the action; and the manner of the taking is not usually considered for the purpose of exemplary damages. It is otherwise, however, in Pennsylvania,[2] Dakota,[3] Ohio,[4] Mississippi,[5] and Texas.[6]

§ 1132. Conversion of money securities. It is a well established principle that when a bill or note has been diverted from the object for which it was intended an action will lie against the person who has unlawfully diverted it for the conversion thereof or for money had and received by him.[7] For the conversion of such instruments or other money securities their owner is, *prima facie*, entitled to recover their face value; that is the presumptive value; and he will be entitled to recover

Pa. 291, 80 Am. Dec. 617; Neiler v. Kelley, 69 Pa. 403; Jacoby v. Laussatt, 6 S. & R. 300; Dennis v. Barber, id. 420; Berry v. Vantries, 12 id. 89; Day v. Woodworth, 13 How. 363; Dibble v. Morris, 26 Conn. 416; Mowry v. Wood, 12 Wis. 413; Fitts v. Howard, 13 Ky. L. Rep. 302 (Ky. Super. Ct.); Bonelli v. Bowen, 70 Miss. 142, 11 So. Rep. 791; Jones v. H. Martini Furnishing Co., 71 Mo. App. 474; San Antonio, etc. R. Co. v. Kniffen, 4 Tex. Civ. App. 484, 23 S. W. Rep. 457; Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S. W. Rep. 881; Downing v. Outerbridge, 79 Fed. Rep. 931, 25 C. C. A. 244; Casey v. Ballou Banking Co., 98 Iowa, 107, 116, 67 N. W. Rep. 98; Reamer v. Morrison Exp. Co., 93 Mo. App. 501, 512; Polykranas v. Krausz, 73 App. Div. 583, 77 N. Y. Supp. 46; Blackmer v. Cleveland, etc. Coal Co., — Mo. App. —. 73 S. W. Rep. 913.

An allegation that the acts complained of were done for the purpose of oppressing the plaintiff and compelling him to surrender his property without receiving compensation therefor, sufficiently charges malice, although the word "malice" is not used. Gensburg v. Marshall Field & Co., 104 Iowa, 599, 74 N. W. Rep. 3.

[1] Land v. Klein, 21 Tex. Civ. App. 3, 50 S. W. Rep. 638.

[2] See Pennsylvania cases cited in first note to this section.

[3] Bates v. Callender, 3 Dak. 256, 16 N. W. Rep. 506.

[4] Peckham Iron Co. v. Harper, 41 Ohio St. 100, 108 (case of fraud by agent against his principal).

[5] Bonelli v. Bowen, *supra*.

[6] Land v. Klein, 21 Tex. Civ. App. 3, 50 S. W. Rep. 638.

[7] Hynes v. Patterson, 95 N. Y. 1; Decker v. Mathews, 12 id. 313; Comstock v. Hier, 73 id. 269, 29 Am. Rep. 142; Murray v. Burling, 10 Johns. 172; Union Nat. Bank v. Post, 64 Ill. App. 404; Bavins v. London & S. Bank, [1900] 1 Q. B. 270.

The right of action for the conversion of a series of notes is an entirety. Skeen v. Springfield Engine & T. Co., 42 Mo. App. 158.

the actual value if in any manner shown.[1] Thus, if bonds are sold the amount realized, with interest from the time of sale, and such interest as had been collected on them previous to sale, is recoverable.[2] The maker of notes which are diverted from their purpose may recover the amount it costs him to discharge them.[3] The rule that the measure of damages for the conversion of securities is, *prima facie*, the amount due on them rests upon the fact that the owner has been divested of

[1] Latham v. Brown, 16 Iowa, 118; Robinson v. Hurley, 11 id. 410; Bredow v. Mutual Savings Inst., 28 Mo. 181; Craig v. McHenry, 35 Pa. 120; Roberts v. Berdell, 61 Barb. 37; Turner v. Retter, 58 Ill. 264; Dennis v. Barber, 6 S. & R. 420; Menkens v. Menkens, 23 Mo. 252; McPeters v. Phillips, 46 Ala. 496; St. John v. O'Connel, 7 Port. 476; Mercer v. Jones, 3 Camp. 476; Wilson v. Conine, 2 Johns. 280; Shotwell v. Wendover, 1 id. 65; Cortelyou v. Lansing, 2 Cai. Cas. 200; Ingalls v. Lord, 1 Cow. 240; King v. Ham, 6 Allen, 298; Tyng v. Commercial Warehouse Co., 58 N. Y. 308; Fisher v. Brown, 104 Mass. 259; Potter v. Merchants' Bank, 28 N. Y. 641; Seals v. Cummings, 8 Humph. 442; Canton v. Smith, 65 Me. 203; Holt v. Van Eps, 1 Dak. 206, 46 N. W. Rep. 869; Decker v. Mathews, 12 N. Y. 313; Evans v. Kymer, 1 B. & Ad. 528; American Exp. Co. v. Parsons, 44 Ill. 312; Ray v. Light, 34 Ark. 421, 430; Merchants' & P.'s Nat. Bank v. Trustees Masonic Hall, 62 Ga. 271; Hayes v. Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. Rep. 322, 1 L. R. A. 303; Pelley v. Walker, 79 Iowa, 142, 44 N. W. Rep. 346; Hersey v. Walsh, 38 Minn. 521, 8 Am. St. 689, 38 N. W. Rep. 613; State v. Berning, 74 Mo. 87; Ramsey v. Hurley, 72 Tex. 194, 12 S. W. Rep. 56; Hurst v. Coley, 15 Fed. Rep. 645; Meixell v. Kirkpatrick, 29 Kan. 679; Union Nat. Bank v. Post, 64 Ill. App. 404; Powell v. Ong, 92 Ill. App. 95; Dean v. Nichols & Shepard Co., 95 Iowa, 89, 63 N. W. Rep. 582; Boley v. Wood Mowing & Reaping Machine Co., 62 Mo. App. 139; Halbert v. Rosenbalm, 49 Neb. 498, 68 N. W. Rep. 622; Griggs v. Day, 136 N. Y. 152, 32 N. E. Rep. 612, 18 L. R. A. 120; Grigsby v. Day, 9 S. D. 585, 70 N. W. Rep. 881; Walley v. Deseret Nat. Bank, 14 Utah, 305, 47 Pac. Rep. 147, quoting the text.

In Brightman v. Reeves, 21 Tex. 70, the presumption of face value was denied and proof required of the actual value.

In Pawson v. Miller, 66 App. Div. 12, 72 N. Y. Supp. 1011, a check called for the payment of two amounts, the smaller being designated in the body of it. This amount the bank offered to pay. On its being taken to the drawer for correction he destroyed it. It was not competent for him to say that it was not worth the sum the bank offered to pay.

[2] Loring v. Brodie, 134 Mass. 453, 463.

[3] Hynes v. Patterson, 95 N. Y. 1. In this case the plaintiff executed notes and loaned them to the defendant, who was to discount them, pay plaintiff ten per cent. of the proceeds and apply the balance to a specified use. The notes were used for an entirely different purpose, and judgment was rendered on them against plaintiff, which he settled by paying less than it called for. The amount thus paid and the counsel fees were recovered.

his property. This rule does not apply where the maker of obligations complains that by reason of the defendant's wrongful act he has become chargeable to and will be compelled to pay innocent holders of them, when but for such act the obligations would never have become binding against him. Where bonds were wrongfully obtained from the person who held them in escrow and transferred to *bona fide* purchasers, the damages were measured (the bonds being outstanding) by their amount at the time judgment was rendered, according to their terms; interest matured on the coupons attached thereto after the conversion and up to the time of judgment; interest at the legal rate upon each matured coupon from the date of its maturity to the date of the judgment, and interest upon the principal of the bonds at the stipulated rate from the time the last coupon matured, prior to the judgment, to the date of the lat-
[521] ter.[1] Stated accounts,[2] and even accounts which have not been stated, are within the rule which presumes them to be worth their face value. This presumption may be easily overthrown as to the latter class.[3] The damages for the conversion of a savings bank book are measured by the actual loss, not by the amount shown by it to be due the depositor. His right to recover the latter sum from the bank is not affected by the loss of the book.[4]

Interest should be computed to the date of the conversion where the face value is recovered and the converted security bore interest;[5] but it is error to compute interest on the face of the notes to the date of demand and then compute it on the whole amount to the date of the verdict.[6] If the defendant has collected annual instalments of interest on a note as they became due and appropriated them to his own use, the owner of the note may recover all such sums paid.[7] The face

[1] Winona v. Minnesota R. & Const. Co., 29 Minn. 68, 13 N. W. Rep. 127.

[2] O'Donoghue v. Corby, 22 Mo. 393; Casey v. Ballou Banking Co., 98 Iowa, 107, 117, 67 N. W. Rep. 98, citing the text.

[3] Sadler v. Bean, 37 Iowa, 439. See Doyle v. Eccles, 17 Up. Can. C. P. 644; Woodborne v. Scarborough, 20 Ohio St. 57.

[4] Newman v. Munk, 36 N. Y. Misc. 639, 74 N. Y. Supp. 467.

[5] Roberts v. Berdell, 61 Barb. 37; Clark v. Bates, 1 Dak. 42, 46 N. W. Rep. 510; Nutting v. Thomasson, 57 Ga. 418; Merchants' & P.'s Bank v. Trustees Masonic Hall, 62 id. 271.

[6] H. S. Benjamin Wagon & C. Co. v. Merchants' Exchange Bank, 63 Wis. 470, 23 N. W. Rep. 592.

[7] Halbert v. Rosenbalm, 49 Neb. 498, 68 N. W. Rep. 622.

value of a check which has been paid on a forged indorsement is the measure of damages after a refusal to surrender it on demand.[1] It seems that there cannot be a recovery of the amount paid for protest fees.[2] The recovery in trover for a receipted account of the plaintiff against the defendant is measured by the value of the document. There is no legal presumption that its value as a chattel is equal to that of the chose in action.[3] The maker of a promissory note can maintain an action for its conversion against one who, before it has any legal inception, wrongfully negotiates it to a *bona fide* holder for value. He is entitled to recover the full amount without averring or proving that he has paid it to the holder. It is sufficient that he is legally liable to pay it.[4] But where a note having the plaintiff's name on it as indorser only has been as to him fraudulently transferred to a *bona fide* holder, and has not yet matured, he is not entitled to maintain an action before he has been called on for payment or his liability is made absolute. He is not yet deemed to have suffered any damage.[5] In a case in which there was a breach of the defendant's contract to deliver the plaintiff's note to him, it was ruled that the latter had a right of action. Dodge, J., said: If the measure of his damages is involved in some degree of uncertainty, or if possibly a recovery of the full amount of the face of the note may work injustice to the defendant, it must be remembered that the situation results from the fault of the latter, and not of the former. The postponement of the plaintiff's recovery till he has paid, especially if he be poor or embarrassed, may subject him to serious injuries meanwhile, enhanced by his poverty. His attempts to do business or to emerge from his state of insolvency may be thwarted at every turn by the impairment of his credit from the mere existence of the liability. Any property acquired by him may be promptly sacrificed in the effort to enforce that liability, and still the debt remain unpaid, and he without remedy; and that, too, without any fault on his part save poverty. As between

[1] Survey v. Wells, etc. Co., 5 Cal. 124.

[2] Hurst v. Coley, 15 Fed. Rep. 645.

[3] Moody v. Drown, 58 N. H. 45.

[4] Decker v. Mathews, 12 N. Y. 313; Winona v. Minnesota R. & Const. Co., 29 Minn. 68, 13 N. W. Rep. 127. See preceding section.

[5] Freeman v. Venner, 120 Mass. 424.

the two, inconvenience should fall on the guilty rather than the innocent. The peril, suggested by the defendant, that the plaintiff may recover and collect judgment against the defendant, and still not pay the note, was pointed out, and held not sufficient to prevent a recovery, in Loosemore v. Radford,[1] and was considered in Johnson v. Britton,[2] where it was shown that under code practice, where law and equity are administered by the same court, it might readily be averted by equitable counterclaim. . . . A note is not necessarily entirely valueless because its maker is insolvent, or because no property subject to execution exists. Many a note has been paid notwithstanding such condition. That situation, too, would largely disappear upon recovery of judgment in the plaintiff's favor which might be in reach of execution. Still less is it true, as already pointed out, that insolvency precludes damage to the maker of such a note from its existence as a liability against him. At most, the plaintiff's financial condition was a circumstance to be considered in assessing the damages.[3] Trover may be brought by the acceptor for the conversion of a paid bill of exchange; nor is he confined to nominal damages; he is entitled to recover in respect of the risk of liability although the bill is utterly valueless.[4] One who converts a written instrument payable by its terms to himself, but in which another has an interest, must account to the latter for his share of the full sum due according to the face thereof unless he shows its actual value.[5] The obligee in a bond may recover in this action against the obligor who tore off his seal; and the whole [522] amount of the penalty, it appearing that the condition had been broken to the damage of the plaintiff to a still greater amount.[6] In such a case no alternative can be given the defendant to deliver up the obligation in discharge of damages.[7] It has been held that the owner may recover for the conversion of a bond the sum he would be entitled to recover on it

[1] 9 M. & W. 657.

[2] 23 Ind. 105.

[3] Lyle v. McCormick Harvesting Machine Co., 108 Wis. 81, 84 N. W. Rep. 18.

[4] Dunne v. Thorpe, B., D. & O. 128. See Hansard v. Robinson, 7 B. & C. 90; Evans v. Kymer, 1 B. & Ad. 528; Stone v. Clough, 41 N. H. 290.

[5] Davies v. Stevenson, 59 Kan. 648, 54 Pac. Rep. 679.

[6] Bank v. Widmer, 2 Up. Can. Jur. (O. S.) 222.

[7] Id.

from the obligee.[1] The conversion of a common-law bond for the payment of a judgment renders the wrong-doer liable, *prima facie*, for the amount of the judgment which it secured.[2] If the party liable on an instrument converts it he is subject to that measure of recovery, and the defense of insolvency has no application.[3] So where a plaintiff sues for conversion of notes made by himself the measure of damages is the amount due on them at the time of the trial without reference to his ability to pay.[4] If a judgment has been recovered against him thereon and he has satisfied it, the amount paid will be the measure of damages.[5] In other cases the insolvency of the parties liable on the paper may be shown in mitigation.[6] If, on account of peculiar circumstances, the note of a person having no property liable to execution would be available to the owner for its full amount he is entitled to recover it.[7]

The fact that at the time a judgment was converted the judgment debtor was insolvent does not necessarily limit the recovery to nominal damages; the fact that he became solvent after the judgment was rendered may be shown.[8] There cannot be a recovery of the expense of an unsuccessful defense to an action on a converted note by the defendant's transferee.[9] It is provided by statute in Georgia that in estimating the value of personalty unlawfully detained the plaintiff may recover the highest amount which he can prove was the value of it between the time of the conversion and the trial. This does not authorize a creditor to recover from his debtor for the conversion of collaterals a sum exceeding the amount of the debt, with interest. In no case can the recovery for the conversion

[1] Romig v. Romig, 2 Rawle, 241; Delany v. Hill, 1 Pittsb. 28.

[2] Johnson v. Dun, 75 Minn. 533, 539, 78 N. W. Rep. 98.

[3] Stephenson v. Thayer, 63 Me. 143.

[4] Robbins v. Packard, 31 Vt. 570; Thayer v. Manley, 73 N. Y. 305; Metropolitan E. R. Co. v. Kneeland, 120 id. 134, 24 N. E. Rep. 381, 17 Am. St. 619, 8 L. R. A. 253.

[5] Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; Hynes v. Patterson, 95 N. Y. 1.

[6] McPeters v. Phillips, 46 Ala. 496; Potter v. Merchants' Bank, 28 N. Y. 641; Latham v. Brown, 16 Iowa, 118; Zeigler v. Wells, etc. Co., 23 Cal. 179, 83 Am. Dec. 87; Cothran v. Hanover Nat. Bank, 40 N. Y. Super. Ct. 401.

[7] Rose v. Lewis, 10 Mich. 483; Delegal v. Naylor, 7 Bing. 460.

[8] Rivinus v. Langford, 75 Fed. Rep. 959, 21 C. C. A. 581.

[9] Dean v. Nichols & Shepard Co., 95 Iowa, 89, 63 N. W. Rep. 582.

of a security exceed the sum which would be recovered were the action brought directly on the debt or demand.[1] Where the note converted was payable in cotton, and the evidence did not show its value at the time when and place where the note was due and payable, a money recovery was denied.[2]

The defendant has a right to show in reduction of damages payment in whole or in part; the inability of the maker to pay, or his release from his undertaking; the invalidity of the instrument, or any other matter which will legitimately affect or diminish its value.[3] But if the maker becomes insolvent after the conversion it will be no ground for mitigation of damages.[4] Where an executor brought trover for the conversion of a note made by himself as an individual to the decedent, his appointment as executor not operating as a discharge of his obligation, he recovered only nominal damages. It was inequitable to apply the general rule and make the defendant liable for the value of the note because he would pay the debt owed the estate by the plaintiff. Besides, inasmuch as the plaintiff could not sue himself, the value of the note to the estate was not established.[5] A mortgagee of chattels who has deposited a mortgage thereof with his creditor can recover only to the extent of the value of the mortgage from a third person who converts it after the creditor has collected his debt out of the goods.[6]

[523] **§ 1133. Conversion of insurance policies.** In trover for conversion of an insurance policy the rule of damages is probably the same as if the action were by the insured upon

[1] Fisher v. George S. Jones Co., 108 Ga. 490, 34 S. E. Rep. 172.

[2] Bell v. Ober & Sons Co., 96 Ga. 214, 23 S. E. Rep. 7.

[3] Booth v. Powers, 56 N. Y. 22; Terry v. Allis, 20 Wis. 32; Ingalls v. Lord, 1 Cow. 240; Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Fell v. McHenry, 42 Pa. 41; King v. Ham, 6 Allen, 298; Mathew v. Sherwell, 2 Taunt. 439; Robinson v. Hurley, 11 Iowa, 410; Ray v. Light, 34 Ark. 421, 430; Thompson v. Halbert, 40 Hun, 536 (statute of limitations); Dean v. Nichols & Shepard Co., 95 Iowa, 89, 97, 63 N. W. Rep. 582; Griggs v. Day, 136 N. Y. 152, 32 N. E. Rep. 612, 18 L. R. A. 120; Walley v. Deseret Nat. Bank, 14 Utah, 385, 47 Pac. Rep. 147, quoting the text; Lyle v. McCormick Harvesting Machine Co., 108 Wis. 81, 84 N. W. Rep. 18.

[4] Knapp v. United States, etc. Exp. Co., 55 N. H. 348; King v. Ham, 6 Allen, 298; Kellogg v. Thompson, 142 Mass. 76, 6 N. E. Rep. 860; Ramsey v. Hurley, 72 Tex. 194, 12 S. W. Rep. 56.

[5] Robinson v. Ferguson, 23 N. B. 332.

[6] Nesbitt v. Moore, 39 S. C. 351, 17 S. E. Rep. 798.

the policy, subject to mitigation by evidence of the insolvency of the insurer.[1] If the insurer converts a policy after liability for a loss has attached the damages are measured by the face of the policy.[2] Where the wrong is done by a third party before a life policy has become payable the damages are measured by the principle which governs where the insurer wrongfully refuses to receive premiums[3] — the difference between the rate of premiums paid for the insurance and what another company of equal credit and standing would charge to issue a new policy on the same life, and the difference in the rates of premium calculated upon his expectancy of life. This rule only governs where the insured is in as good condition of health as he was when his policy was procured. In such a case the amount paid on it and interest thereon is not the measure of recovery because he would have had insurance without cost.[4] If, however, the life insured is no longer insurable the value of the policy at the time the wrong was done, with interest, may be recovered,[5] less the premiums which became due intermediate the conversion and the death of the insured. In New York the allowance of interest is within the discretion of the jury.[6] In trover for a policy it appeared that it was void; the plaintiff had assigned it as security for a debt, and the pledgee, on receipt of a certain amount from the insurer as a gratuity, had delivered it up to be canceled. It was held that the plaintiff was entitled to only nominal damages for the value of the parchment; he had no claim for the full amount of the policy, for it was confessedly bad, nor to the sum paid the defendant, for it was merely a gratuity.[7] In one case trover was sustained for a policy which was never effected. An agent had been employed to procure insurance, and reported that he had

[1] Kohne v. Insurance Co., 1 Wash. C. C. 93. See Chicago Building Society v. Crowell, 65 Ill. 453.

[2] Hayes v. Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. Rep. 322, 1 L. R. A. 303.

[3] § 838.

[4] This consideration has weight as between insured and insurer, but it is of very doubtful application as between the former and a third party.

[5] Barney v. Dudley, 42 Kan. 212, 21 Pac. Rep. 1079, 16 Am. St. 476; Toplitz v. Bauer, 161 N. Y. 325, 336, 57 N. E. Rep. 1059, 34 App. Div. 526, 55 N. Y. Supp. 20.

If the policy converted had no market or trade value its value to the owner at the time of the conversion will furnish the measure of damages. Woodworth v. Hascall, 59 Neb. 124, 80 N. W. Rep. 483.

[6] Toplitz v. Bauer, *supra*.

[7] Wills v. Wells, 8 Taunt. 264.

done so, when in fact he had not. He was not permitted to gainsay his representation, and was held to the same liability as an insurer for the indemnity the plaintiff would have had if the representation had been true.[1] A pledgor whose policy has been unlawfully canceled by the pledgee and the insurer is not bound to accept in mitigation of damages the original policy which has been re-issued to the pledgee upon the surrender of one obtained by him in lieu of the original. The question of the validity of the latter cannot be determined in an action between those parties. The defendant is presumed to have in his possession the market value of the plaintiff's policy, and that the increase of such value subsequent to the conversion, less the amount due the pledgee on the debt for which the policy was given as collateral, is the measure of recovery.[2]

§ 1134. Conversion of deeds, etc. Damages for conversion of deeds and other instruments will be allowed according to the loss in the particular case. If the party deprived of a deed is in possession of all it was intended to convey the damages are less than when he is out of possession.[3] In the latter case the jury may give the full value of the estate as damages, but these are generally reduced to a small sum on the deed being given up.[4] Where the obligor in a bond to convey land has converted the bond, the measure of damages has been held to be the value of the land. This may justly be awarded, for recovery and satisfaction would extinguish the equitable interest, and thus have the same effect to transfer title as in other cases.[5] But where the conversion of a deed will not affect the owner's title, and the wrong is not one for which punitive damages can be given, the proper measure is such a sum as will recom- [524] pense the plaintiff for any actual loss he may have sustained, and for the trouble and expense of going into a court of equity or elsewhere to establish and perpetuate the evidence of his title.[6] A. having agreed to purchase of B. the remainder

[1] Harding v. Carter, Park on Insurance, 5.

[2] Wheeler v. Pereles, 43 Wis. 332; Bailey v. American Deposit & Loan Co., 52 App. Div. 402, 65 N. Y. Supp. 330.

[3] Lloyd v. Sadlier, 7 Irish Jur. (N. S.) 15.

[4] Loosemore v. Radford, 9 M. & W. 657; Coombe v. Sansom, 1 D. & R. 201.

[5] Clowes v. Hawley, 12 Johns. 483.

[6] Mowry v. Wood, 12 Wis. 413; Edwards v. Dickinson, 102 N. C. 519, 9 S. E. Rep. 456.

of a term, the latter delivered to him the lease in order that he might get an assignment made out. A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B.'s under-tenant had removed some fixtures. It was held that B. might insist on A. accepting the assignment, and after demand and refusal of the lease might maintain trover for it and recover the agreed price as damages.[1]

§ 1135. Conversion of shares of stock. The more important questions arising out of the conversion of such property are elsewhere considered.[2] If there is a refusal to deliver stock on demand and it is subsequently tendered and accepted, the owner may recover the difference between its value when demand was made and when it was delivered.[3] The loss of dividends declared on converted stock between the time of doing the wrong and making demand for the stock is a direct and necessary result of the conversion, and they may be recovered.[4] It has been held in South Carolina that the person who converts certificates of shares of stock is liable for their full value.[5] This is doubtless correct if the effect of the act is to deprive the owner of his stock; but if that result does not follow and the defendant does not become the owner of it after recovery against him it is erroneous.[6] If a certificate of membership in a board of trade is converted and loss of membership follows the damages are, *prima facie*, the value of the right to transact business as a member thereof,[7] or the value of the stock represented by the certificate.[8] If the stock for the conversion of which an action is brought against the corporation which issued it by the purchaser and debtor has not been fully paid for, the amount due thereon may be deducted

In Texas the owner of land scrip which has been converted is not bound to pursue the property in the hands of a third person or institute suit to establish his right to it as against the holder. The scrip was treated as if it were a chattel and unlike an ordinary deed, because it had a market value. Nelson v. King, 25 Tex. 655.

[1] Parry v. Frame, 2 B. & P. 451.

[2] §§ 1118–1125.

[3] McDonald v. McKinnon, 104 Mich. 428, 62 N. W. Rep. 560.

[4] Briggs v. Kennett, 8 N. Y. Misc. 264, 28 N. Y. Supp. 540.

[5] Connor v. Hillier, 11 Rich. 193, 73 Am. Dec. 105.

[6] Daggett v. Davis, 53 Mich. 35, 18 N. W. Rep. 548, 51 Am. Rep. 91.

[7] Olds v. Chicago Open Board of Trade, 33 Ill. App. 445.

[8] Barth v. Union Nat. Bank, 67 Ill. App. 131.

if it does not exceed the market price of the stock.[1] Executors who retain railroad stock under circumstances which prevent the reorganization of a railroad company are estopped from claiming that the person entitled to the stock would not have availed himself of his privilege if they had not done the wrong. But if such executors have purchased the railroad property on foreclosure for reorganization of the company after the plan of reorganization had been made public, the party entitled to the stock cannot recover damages because of the resulting hindrance experienced by him in connection with the reorganization.[2]

§ 1136. Recovery limited to plaintiff's interest. To entitle a plaintiff in trover to recover the full value of the property from one who converts it, he must be the owner thereof, or, if not such, have a right of possession with responsibility over to the general owner. The goods must be stated in the declaration to be those of the plaintiff. He must have the title or right of possession at the time of the conversion.[3] Property in a third person, with whom the wrong-doer is in no privity, will be wholly unavailing to one who tortiously invades actual possession, or to rebut a right inferable therefrom. Actual possession, not wrongful as to the defendant, will be sufficient to maintain the action unless the plaintiff has possession as a mere servant to somebody else.[4] But under a plea which puts the plaintiff's possession and property in issue at the time of the conversion, the defendant may show title in a third person. Such proof tends to controvert the plaintiff's title; and where the defendant has a right of possession derived from the general owner, or has acted by his authority,

[1] Budd v. Multnomah Street R. Co., 15 Ore. 413, 15 Pac. Rep. 659, 3 Am. St. 169.

[2] Griggs v. Day, 158 N. Y. 1, 52 N. E. Rep. 692.

[3] Thayer v. Hutchinson, 13 Vt. 507, 37 Am. Dec. 607; Kemp v. Thompson, 17 Ala. 9; Pattison v. Adams, 7 Hill, 126, 42 Am. Dec. 59; Bond v. Mitchell, 3 Barb. 304; Curd v. Wunder, 5 Ohio St. 92; Fairbank v. Phelps, 22 Pick. 538; Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271; Baker v. Seavey, 163 Mass. 522, 40 N. E. Rep. 863, 47 Am. St. 475; Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. Rep. 313; Clendening v. Hawk, 8 N. D. 419, 79 N. W. Rep. 878; Henderson v. Williams, [1895] 1 Q. B. 521.

[4] Freshwater v. Nichols, 7 Jones, 251; Bartlett v. Hoyt, 29 N. H. 317; Harris v. Smith, 3 S. & R. 20; Hampton v. Brown, 13 Ired. 18; Gruman v. Smith, 81 N. Y. 27; Bennett v. Gilbert, 194 Ill. 403, 62 N. E. Rep. 847, 94 Ill. App. 505.

or has responded to him, he is entitled to set up his [525] title.[1] If the plaintiff is not possessed of the full title, but has actual possession with responsibility over to the true owner for the property, or has any special possessory title, however temporary, if it existed at the time of the conversion, he may recover the full value as against a mere stranger or wrong-doer.[2] But if the plaintiff, having but a limited title, brings his action against one having the remaining interest, or against one claiming under such residuary owner, he can then recover only according to his interest.[3] The defendant hired a negro

[1] Bates v. Stanton, 1 Duer, 79; Beach v. Berdell, 2 id. 327; Edson v. Weston, 7 Cow. 278; King v. Richards, 6 Whart. 418, 37 Am. Dec. 420; Ogle v. Atkinson, 5 Taunt. 759; Sheridan v. New Quay Co., 4 C. B. (N. S.) 618; Floyd v. Bovard, 6 W. & S. 75; White v. Teal, 12 Ad. & E. 114; Sylvester v. Girard, 4 Rawle, 185; Baker v. Seavey, 163 Mass. 522, 40 N. E. Rep. 863, 47 Am. St. 475.

[2] Mechanics' & Tr. Bank v. Farmers' & M. Bank, 60 N. Y. 40; Buck v. Remsen, 34 id. 383; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Davidson v. Gunsolly, 1 Mich. 388; McGowen v. Young, 2 Stew. 276; Pomeroy v. Smith, 17 Pick. 85; Gruman v. Smith, 81 N. Y. 27; Adamson v. Petersen, 35 Minn. 529, 29 N. W. Rep. 321; Leoncini v. Post, 37 N. Y. St. Rep. 255, 13 N. Y. Supp. 825; Philbrook v. Eaton, 134 Mass. 398; Jones v. Kellogg, 51 Kan. 263, 284, 33 Pac. Rep. 997, 37 Am. St. 278, citing the text; Hanly v. Davis, 166 Mass. 1, 43 N. E. Rep. 523; Rund v. Blatt, 170 Mass. 469, 49 N. E. Rep. 642; Vandiver v. O'Gorman, 57 Minn. 64, 58 N. W. Rep. 831; Rector-Wilhelmy Co. v. Nissen, 35 Neb. 716, 724, 53 N. W. Rep. 670; Bigelow v. Goble, 9 App. Div. 391, 41 N. Y. Supp. 299; Einstein v. Dunn, 61 App. Div. 195, 201, 70 N. Y. Supp. 520; Sanger v. Henderson, 1 Tex. Civ. App. 412, 21 S. W. Rep. 114; Martin-Brown Co. v. Henderson, 9 Tex. Civ. App. 130, 28 S. W. Rep. 695; Cabell v. Johnston, 14 Tex. Civ. App. 472, 35 S. W. Rep. 946; White v. Sterzing, 11 Tex. Civ. App. 553, 32 S. W. Rep. 909; F. A. Thomas Machine Co. v. Voelker, 23 R. I. 441, 50 Atl. Rep. 838.

[3] Fowler v. Gilman, 13 Met. 267; Klinkert v. Fulton Storage & M. Co., 113 Wis. 493, 89 N. W. Rep. 507; Tenney v. State Bank, 20 Wis. 152; Briggs v. Boston, etc. R. Co., 6 Allen, 246, 83 Am. Dec. 626; Case v. Hart, 11 Ohio, 364; Peebles v. Boston, etc. R. Co., 112 Mass. 498; McGuire v. Galligan, 57 Mich. 38, 23 N. W. Rep. 479; Ganong v. Green, 71 Mich. 1, 38 N. W. Rep. 661; Becker v. Dunham, 27 Minn. 32, 6 N. W. Rep. 406; Lugenbeal v. Lamert, 42 Ohio St. 1; Norris v. McCanna, 29 Fed. Rep. 757; Warner v. Vallily, 13 R. I. 483; Bradley v. Burkett, 82 Ga. 255, 11 S. E. Rep. 492; Horner v. Guiser Manuf. Co., 74 Ga. 790; Lacy v. Johnson, 58 Wis. 414, 17 N. W. Rep. 246; Mississippi Mills v. Meyer, 83 Tex. 433, 18 S. W. Rep. 748; Seibold v. Rogers, 110 Ala. 438, 18 So. Rep. 312; Sunny South Lumber Co. v. Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. Rep. 902; Stanley v. Citizens' Coal & Coke Co., 24 Colo. 103, 49 Pac. Rep. 35; Huellmantel v. Vinton, 116 Mich. 621, 74 N. W. Rep. 1004; Tobener v. Hassinbusch, 56 Mo. App. 591; Haverly v. Elliott, 39 Neb. 201, 57 N. W.

to the plaintiff for two years and put him in possession; soon afterwards the defendant got possession of the negro and sold him. In trover it was held the hirer was entitled to recover the difference between the amount fixed as hire and the profits of the negro's labor for the stipulated term.[1] The holder of a lien, seeking to enforce it against the owner, or who sues the owner or one claiming under him for injury to or conversion of the property, can only recover the value of his lien.[2] A mortgagee is not entitled to recover from an officer, who seizes mortgaged chattels, the whole amount of the mortgage debt, regardless of their value or of the damage sustained because the defendant did not comply with a statute requiring him to pay, or tender to the mortgagee, or deposit for him the amount of the mortgage debt. The recovery cannot exceed the value of the property converted and such other damage as immediately results to the mortgagee from the conversion, such as loss of time and expense in discovering the property. If the value of the latter is in excess of the debt and such damages, these measure the recovery.[3] One

Rep. 1010; Harvey v. Morse, 69 N. H. 475, 45 Atl. Rep. 239; Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112, 118, 20 Atl. Rep. 203, 9 L. R. A. 260; Kohn v. Dravis, 94 Fed. Rep. 288, 36 C. C. A. 253; California Cured Fruit Ass'n v. Ainsworth, 134 Cal. 461, 66 Pac. Rep. 586, citing the text; F. A. Thomas Machine Co. v. Voelker, 32 R. I. 441, 50 Atl. Rep. 838.

[1] Compton v. Martin, 5 Rich. 14.

[2] Brown v. Union Savings & Loan Ass'n, 28 Wash. 657, 69 Pac. Rep. 383; Hays v. Riddle, 1 Sandf. 248; Bailey v. Godfrey, 54 Ill. 507, 5 Am. Rep. 157; Sheldon v. Southern Exp. Co., 48 Ga. 625; Spoor v. Holland, 8 Wend. 445, 24 Am. Dec. 37; Ward v. Henry, 15 Wis. 239; Harris v. Grant, 96 Ga. 211, 23 S. E. Rep. 390; Mantonya v. Martin Emerich Outfitting Co., 172 Ill. 92, 49 N. E. Rep. 721, 69 Ill. App. 62; Thompson v. Anderson, 86 Iowa, 703, 53 N. W. Rep. 418; Burton v. Randall, 4 Kan. App. 593, 46 Pac. Rep. 326; Benton v. McCord, 96 Ga. 393, 23 S. E. Rep. 392; West v. White, 165 Mass. 258, 43 N. E. Rep. 103; Schmittdiel v. Moore, 120 Mich. 199, 79 N. W. Rep. 195; Watson v. Coburn, 35 Neb. 492, 53 N. W. Rep. 477; Kasper v. Walla, 49 Neb. 288, 68 N. W. Rep. 476; Plummer v. Green, 49 Neb. 316, 68 N. W. Rep. 500; Lovejoy v. Merchants' State Bank, 5 N. D. 623, 67 N. W. Rep. 956; Clendening v. Hawk, 8 N. D. 419, 79 N. W. Rep. 878; Hundley v. Calloway, 45 W. Va. 516, 31 S. E. Rep. 937; Donnelly v. Graves, 6 Vict. L. R. (law) 247, 254.

If a mortgagee sues for a sum less than the value of the property he may recover the costs and charges properly incurred in protecting his property and enforcing his security whereby he would be entitled to recover these as against the mortgagor by virtue of the security. Manning v. Jonas, 14 N. Z. L. R. 53.

[3] Rocheleau v. Boyle, 12 Mont. 590, 31 Pac. Rep. 533; Keith v. Haggart, 4 Dak. 438, 33 N. W. Rep. 465; Irwin

who takes property impounded under trustee process from the possession of the trustee is liable to the amount of a judgment rendered against and paid by the trustee, not exceeding the value of the property; and it is immaterial that such judgment was by default if it appears that the trustee would have been chargeable had he made a disclosure.[1] A partner who sues for the conversion of his interest in firm property can only recover the value of his undivided share therein where the proceeds of the converted property have been applied in satisfaction of the firm indebtedness. It will not be assumed that the plaintiff in such an action owned more than an undivided half of the property, or that upon a settlement of accounts between the partners he would be entitled to a lien upon the other half for the balance due him as a partner.[2] Under the insolvency laws of Massachusetts so long as a solvent partner is ready and willing to settle the business and dispose of the partnership property and account for and pay over the proceeds, an assignee in insolvency of one of the partners has no right to the possession of the partnership property. Such property and the solvent member of the firm are not within the jurisdiction of the court of insolvency. Hence, in an action for the conversion of partnership property attached on a writ against one partner, the solvent partner may recover the full value of the property though the defendant has delivered it to the assignee in insolvency of the other partner.[3] The owner's recovery may be limited to a nominal sum if the property converted was attached by his creditor before the action of trover was brought. The conversion did not vest the title in the wrong-doer; that was in the plaintiff when possession was taken from the defendant by virtue of the attachment. The plaintiff will have the benefit of it by its application to the payment of his debt.[4]

§ **1137. Same subject.** A party who has a lien on or other special interest in property and converts it is liable to the owner for its value, but is entitled to recoup the value of his

v. McDowell, 91 Cal. 119, 27 Pac. Rep. 601.

[1] Deno v. Thomas, 64 Vt. 358, 24 Atl. Rep. 140.

[2] Carrie v. Cloverdale Banking & C. Co., 90 Cal. 84, 27 Pac. Rep. 58.

[3] Russell v. Cole, 167 Mass. 6, 44 N. E. Rep. 1057.

[4] Jones v. Cobb, 84 Me. 153, 24 Atl. Rep. 798. See § 1141.

special property.[1] This right of recoupment may be extended, under the American authorities, to cases or to counter-claims [526] where there is no lien or special property. It does not depend on a lien,[2] as we shall have occasion to notice under the next head.[3] In short, if the plaintiff, not being completely the owner, has the possession or the right of possession as to the defendant at the time of the conversion, so that he is under a contract obligation to preserve the property and deliver it to the owner, or is liable to him for it, however that liability may arise, he is entitled to recover the full value. On the other hand, if he is not completely and absolutely the owner and is under no such obligation or liability, he can recover only the value of his own interest. The suit then, in some

[1] Jarvis v. Rogers, 15 Mass. 389; Stearns v. Marsh, 4 Denio, 227, 47 Am. Dec. 248; Belden v. Perkins, 78 Ill. 449; Wheeler v. Pereles, 43 Wis. 332; Chadwick v. Lamb, 29 Barb. 518; McCalla v. Clark, 55 Ga. 53; Jones v. Horn, 51 Ark. 19, 9 S. W. Rep. 309, 14 Am. St. 17; Ludden v. Buffalo Batting Co., 22 Ill. App. 415; Rosenzweig v. Frazer, 82 Ind. 342; Torp v. Gulseth, 37 Minn. 135, 33 N. W. Rep. 550; Brink v. Freoff, 40 Mich. 610, 44 id. 69, 6 N. W. Rep. 94; Feige v. Burt, 118 Mich. 243, 77 N. W. Rep. 928, 74 Am. St. 390; Van Schaick v. Ramsey, 90 Hun, 550, 35 N. Y. Supp. 1006; Lovejoy v. Merchants' State Bank, 5 N. D. 623, 67 N. W. Rep. 956, citing the text; Kohn v. Dravis, 94 Fed. Rep. 288, 36 C. C. A. 253; Smith v. Savin, 141 N. Y. 315, 329, 36 N. E. Rep. 338; Union Nat. Bank v. Post, 64 Ill. App. 404, 93 id. 339, 192 Ill. 385, 61 N. E. Rep. 507; Richardson v. Ashby, 132 Mo. 238, 33 S. W. Rep. 806; Barber v. Hathaway, 47 App. Div. 165, 62 N. Y. Supp. 329, affirmed without opinion, 169 N. Y. 575.

A pledgee who sells the pledged property after a *bona fide* tender of the amount due is liable for the full value of it without any abatement for the amount for which the property was pledged. Hyams v. Bamberger, 10 Utah, 1, 36 Pac. Rep. 202.

If the debt has been discharged in full pending the action, the damages will be such sum as will carry costs. If a judgment is relied on to establish the amount of the liability of the pledgor on the principal debt the defendant cannot go behind the judgment and show that the amount thereof, though apparently due, was not so in fact. Holmes v. Langston, 110 Ga. 860, 36 S. E. Rep. 251.

[2] Baltimore Ins. Co. v. Dalrymple, 25 Md. 269; Johnson v. Stear, 15 C. B. (N. S.) 330; Cole v. Dalziel, 13 Ill. App. 23; Ludden v. Buffalo Batting Co., 22 id. 415.

The defendant cannot recoup damages sustained by the fraud of the plaintiff. "Recoupment in the nature of damages cannot be pleaded by the defendant nor adjudicated in an action of trover unless some special equity, such as non-residence or the insolvency of the plaintiff, is shown." Bell v. Ober & Sons Co., 111 Ga. 668, 673, 36 S. E. Rep. 904; Harden v. Lang, 110 Ga. 392, 36 S. E. Rep. 100.

[3] See Briggs v. Boston, etc. R. Co., 6 Allen, 246, 83 Am. Dec. 626; Parish v. Wheeler, 22 N. Y. 494.

sort, accomplishes a partition; the plaintiff takes his part in value and leaves the residue in the hands of the defendant. And in actions by the general owner, or one recovering in that right, the defendant is entitled to recoup for his special interest, whatever it may be, and for any cross-demand growing out of the same transaction, whether it be a lien interest or not. And he is, besides, entitled to mitigations, which we shall presently consider, arising from the principle of limiting the plaintiff's compensation to his actual loss. He may show that the latter has not suffered so great a loss as his case, on the proof, imports, by reason of other facts which are part of the *res gestæ;* as payments or other acts done by the defendant in connection with the conversion which have the effect to lessen the injury or partially to compensate it. In Massachusetts it is presumed, *prima facie*, that a note taken in renewal of or for an antecedent debt is received in payment. A pledgee of a note who takes from the maker two other notes to the pledgee's own order and surrenders the original note to the maker, and afterwards renews such notes, from time to time receiving small payments, and finally combines the amount due on one of the notes with the amount of another claim, held against the maker, and takes a new note for the amount of both claims, is liable to the pledgor for the full amount of the original note.[1] The general rule is that a pledgor or any person who converts the pledge under his authority is liable for the value of the pledge with interest from the time of conversion unless such sum is in excess of that due to the pledgee, in which case the latter sum measures the damages.[2] A first mortgagee who is sued for the conversion of the mortgaged property may show that the plaintiff gave other mortgages thereon subsequent to his and before the conversion occurred.[3]

[1] Stevens v. Wiley, 165 Mass. 402, 43 N. E. Rep. 177, citing Depuy v. Clark, 12 Ind. 427; Freeman v. Benedict, 37 Conn. 559; Garlick v. James, 12 Johns. 146; Gage v. Punchard, 6 Daly, 229; Nexsen v. Lyell, 5 Hill, 466; Southwick v. Sax, 9 Wend. 122, and distinguishing Hunter v. Moul, 98 Pa. 13, 42 Am. Rep. 610; Exeter Bank v. Gordon, 8 N. H. 66; Randolph v. Merchants' Nat. Bank, 9 Lea, 63.

[2] Hurst v. Coley, 15 Fed. Rep. 645; Hay v. Riddle, 1 Sandf. 248; Holmes v. Langston, 110 Ga. 860, 36 S. E. Rep. 251; Jones v. Hicks, 52 Miss. 682; Jones on Pledges (2d ed.), § 432; E. F. Hallack Lumber & Manuf. Co. v. Gray, 19 Colo. 149, 34 Pac. Rep. 1000.

[3] Kohn v. Dravis, 94 Fed. Rep. 288, 36 C. C. A. 253.

Where the vendee in a conditional sale sold the property before he acquired the title by fulfilling the condition of paying for it, the vendor in trover was held entitled to recover the full value without any deduction for payments received by him from his vendee.[1] But in Pennsylvania, where the party making the conditional purchase was the defendant, the plaintiff was held entitled to recover only the value of his beneficial interest; the defendant was allowed the benefit of his payments. As trover is an equitable action, this appears [527] more just and in accordance with the principle of limiting recovery to just compensation.[2] The same rule has been laid down and applied in Missouri, Kansas, Georgia, Iowa and Michigan.[3] A piano was sold conditionally, title to pass on all the payments being made. After a large part of the purchase-money had been paid the vendor sued for its conversion. The court held that the payments would go in mitigation; and that the defendant was also entitled to recoup the damages, if any, for breach of the warranties in the contract of sale.[4] A vendee of goods received them at a stipulated price, payable in certain indorsed notes, on condition that within a given period he should deliver the notes or return the goods; he afterwards refused to do either, and the vendor sued him for the goods in trover. It was held that the measure of damages was their actual value and interest; the vendee was not concluded by the agreed price. Under such circumstances it was thought that that price was high evidence of actual value as against the wrong-doer, and should not be reduced except upon strong proof. Had the vendor, instead of electing to disaffirm the contract, sued in *assumpsit*, he would have been entitled to the agreed price, though subject even then to a de-

[1] Brown v. Haynes, 52 Me. 578; Buckmaster v. Smith, 22 Vt. 203; Smith v. Foster, 18 Vt. 182.

[2] Farmers' Bank v. McKee, 2 Pa. 318; Rose v. Story, 1 id. 190, 44 Am. Dec. 121. See Anderson v. Durant, 18 N. Y. 496; Shepherd v. Taylor, 105 Ala. 507, 17 So. Rep. 88.

[3] Guilford v. McKinley, 61 Ga. 230; Boutell v. Warne, 62 Mo. 350; Johnston v. Whittemore, 27 Mich. 463; Bower v. Birdsell, 49 id. 5; Bradley v. Burkett, 82 Ga. 255, 11 S. E. Rep. 492; Ross v. McDuffie, 91 Ga. 120, 16 S. E. Rep. 648; Colby v. W. W. Kimball Co., 99 Iowa, 321, 326, 68 N. W. Rep. 786.

If the purchaser has paid nothing his recovery is limited to the value of his bargain. Meixell v. Kirkpatrick, 29 Kan. 679.

[4] Guilford v. McKinley, 61 Ga. 230.

duction, if it turned out that the notes stipulated for were of less value.[1] Where one of several part owners sues a stranger for conversion of the common property he can only recover in respect of his part, and the damages will be apportioned.[2]

§ 1138. Mitigation of damages. If the case is such that the plaintiff can be fully compensated by a sum of money less than the full value of the property converted the recovery will be limited to the amount that will suffice for complete indemnity. He will be confined to compensation commensurate with the actual injury.[3] The recovery is so reduced [528] when the plaintiff has only a special property subject to which the defendant is entitled to the goods.[4] Courts of law in actions of trover are authorized to investigate the justice and equity of the particular case in a manner and upon principles similar to those by which, in such courts, the defense of partial failure of consideration is sustained.[5] Where an officer was sued by the debtor for attaching exempt property, and he by direction of the creditor, who had become the legal owner of a mortgage thereon, sold it under the mortgage and applied the proceeds thereon, it was held that the sum so applied should

[1] Stevens v. Low, 2 Hill, 132.

[2] Noland v. Johnson, 5 J. J. Marsh. 351; Powell v. Glenn, 21 Ala. 458; Wing v. Milliken, 91 Me. 387, 40 Atl. Rep. 138, 64 Am. St. 238.

[3] Cook v. Loomis, 26 Conn. 483; Chamberlain v. Shaw, 18 Pick. 278, 29 Am. Dec. 586; Jones v. Horn, 51 Ark. 19, 9 S. W. Rep. 309, 14 Am. St. 17; White v. Allen, 133 Mass. 423; Kyle v. Caravello, 103 Ala. 150, 15 So. Rep. 527; Lovejoy v. Merchants' State Bank, 5 N. D. 623, 625, 67 N. W. Rep. 956, quoting the text; Brewster v. Silliman, 38 N. Y. 423; Reynolds v. Shuler, 5 Cow. 337; Stone v. Chicago, etc. R. Co., 3 S. D. 330, 53 N. W. Rep. 189; Field v. Munster, 11 Tex. Civ. App. 341, 344, 32 S. W. Rep. 417, quoting the text.

An unauthorized sale of pledged property by the pledgee does not cause him to lose his lien and render him liable for the value of the property, if the pledgor was not damaged. Whipple v. Dutton, 175 Mass. 365, 56 N. E. Rep. 581, 78 Am. Am. St. 501.

[4] Id.; Hyde v. Cookson, 21 Barb. 92; Pierce v. Benjamin, 14 Pick. 356.

[5] McGowen v. Young, 2 Stew. & P. 160; Bates v. Murphy, id. 161; Sprague v. Brown, 40 Wis. 620; Field v. Munster, 11 Tex. Civ. App. 341, 347, 32 S. W. Rep. 417. See Wilson v. Conine, 2 Johns. 280.

A set-off cannot be allowed in trover. Sinamaker v. Rose. 62 Ill. App. 118.

The price of land sold to the mortgagee by a chattel mortgagor under an agreement that its value should be applied on the mortgage indebtedness should be considered in reduction of the damages in an action by the mortgagee against an officer for the conversion of the mortgaged property. Huellmantel v. Vinton, 112 Mich. 47, 70 N. W. Rep. 412.

go in mitigation of damages.[1] Where the mortgagor of goods has sold part of them in accordance with the terms of the mortgage he is entitled to credit for the expenses of doing so, notwithstanding the remainder of the stock was sold without authority.[2] If the property converted was subject to a lien the defendant may show payment in whole or in part of the lien debt, and thereby defeat or reduce *pro tanto* his liability.[3] The liability of the wrong-doer is not lessened by an independent or wrongful act done by the plaintiff.[4]

A special agent to whom a bill of lading was sent with instructions to deliver it to a purchaser on his paying a forthcoming draft for the price delivered it on a mere acceptance of the draft, and the purchaser obtained the goods from a common carrier on paying the freight; such purchaser then pledged the goods to the defendant. The latter was held liable for their value at the time of the conversion, less the freight paid by the pledgor; but no deduction was allowed for commissions which would have been due to the pledgor if the goods had been disposed of according to the owner's instruction.[5] The right to recoup for freight wrongfully paid has been denied in New York.[6] It has been held in Kentucky, after a careful review of the authorities, that there is no substantial difference between the effect of a pledge made by a factor and one made by a pledgee; that, though a factor wrongfully pledges the goods of his principal, the amount the latter may recover of the factor's innocent pledgee must be reduced by the sum the plaintiff owed the factor.[7]

[1] Cooper v. Newman, 45 N. H. 339.

[2] Kohn v. Dravis, 94 Fed. Rep. 288, 36 C. C. A. 253.

[3] Karter v. Fields, 130 Ala. 430, 30 So. Rep. 504; Waite v. Corbin, 109 Ala. 154, 19 So. Rep. 505.

[4] Wyckoff v. Bodine, 65 N. J. L. 95, 47 Atl. Rep. 23.

[5] Stollenwerck v. Thacher, 115 Mass. 224; Covell v. Hill, 6 N. Y. 374; Whitney v. Beckford, 105 Mass. 267; Peebles v. Boston, etc. R. Co., 112 id. 498; Forbes v. Boston & L. R., 133 id. 154.

[6] Walther v. Wetmore, 1 E. D. Smith, 7.

[7] First Nat. Bank v. Boyce, 78 Ky. 42, 39 Am. Rep. 198. The court criticised the following statement made in the eighth edition of Story on Bailments (§ 326): "Later decisions have, however, fully settled the law that a pledge by a factor of his principal's goods is wholly tortious and the owner may recover their whole value of the pledgee without any deduction or recoupment for his claim against the factor." The cases cited to sustain this proposition are Hoffman v. Noble, 6 Met. 74, 39 Am. Dec. 611; Warner v. Martin, 11 How. 209; Holton v. Smith, 7 N. H. 446;

In a Massachusetts case against a broker for the conversion of shares of stock held as margin for a purchase made by direction of the plaintiff, who failed to furnish additional margin, whereupon the defendant sold the purchased stock at a loss and afterwards the margin, the claim of the defendant for the sum due in respect of the purchase was allowed. The argument was on the theory that the case was one of recoupment; but the court said that if that were the proper way of regarding it it might be difficult to maintain that the defendant's claim arose out of the same transaction with the plaintiff's, for it might be objected that to maintain the claim for the conversion the plaintiff did not rely upon his contract with the defendant, but stood on his title. The claim was not recoupment properly so called. The defendant had an interest in the property to the extent of the sum due him for which the property was held as security, and as against him the plaintiff to that extent was not entitled to compensation. There are numberless decisions that when pledgees, mortgagees or persons having a lien convert a pledged chattel by selling it in an unauthorized way, they are entitled to retain the amount of their lien.[1] A factor who hypothecates the goods of his consignor for his own debt, so that any surplus they may bring in excess of the factor's demand would go to others than the consignor, is liable for the value of the goods at the time he disposed of them free from charges made against them subsequently, including commissions and charges on subsequent sales.[2] The view held in Kentucky may not be harmonizable with the English law. The question came up in Victoria in 1877 in a case which had previously been before the court. It was then assumed that the factor was entitled to deduct from the damages the amount which he could have demanded before he could be compelled to deliver up the goods. On the second appeal the court admitted that that view was erroneous, and held "that where a party having a lien abuses it by wrongfully parting with the goods, the measure of damages is the value of the goods."[3]

Newbold v. Wright, 4 Rawle, 195. The three first of these, the court says, have no bearing upon the question, and the last did not necessarily involve the right of recoupment.

[1] Farrar v. Paine, 173 Mass. 58, 53 N. E. Rep. 146.

[2] Halsey v. Bird, 99 Fed. Rep. 525, 39 C. C. A. 638.

[3] Osborne v. Synnot, 3 Vict. L. R.

§ 1139. Same subject. If after the conversion of property it goes into the possession of the plaintiff, and he accepts it, this will go in mitigation of damages, even though no agreement be shown on his part that he will receive it.[1] So, if the [529] property has gone to the plaintiff's use with his consent, expressed or implied, and, it seems, without such consent,[2] the

(law) 148, citing De Comas v. Prost, 3 Moore's P. C. (N. S.) 158, 12 L. T. 682. The opinion contains the following: A strong illustration of the rule is afforded by Jacobs v. Latour, 5 Bing. 130. There the defendant, having a lien on horses, caused the sheriff to seize and sell them under a writ of *fi. fa.*, and at the sale became himself the purchaser. After the sale a commission of bankruptcy issued against the former owner of the horses, founded on an act of bankruptcy prior to the execution. The assignee brought trover against the purchaser, and it was contended that, assuming the execution to be void against the assignee in bankruptcy, the purchaser could not set up his lien as an answer to the action, the horses never having been out of his possession; but it was held that the lien was gone by the sale. It would be almost a contradiction in terms to say that the lien was gone or lost so far as to enable the owner to sue, but remained so far as to disable him from recovering the full value of the chattel. Accordingly, in Siebel v. Springfield, 9 L. T. (N. S.) 324, it was held that a tortious sale by a factor enabled the owner to recover the full value of the goods. The lien of an unpaid vendor—which was the case in Chinery v. Viall, 5 H. & N. 288, 29 L. J. Ex. 180 — stands on a different ground. That kind of a lien has been described as something more than a lien. It is the remnant of an original ownership, and exists even after possession has been parted with, as is shown by the right to stop *in transitu* on the purchaser's insolvency.

[1] Murphy v. Hobbs, 8 Colo. 17, 11 Pac. Rep. 55; King v. Franklin, 132 Ala. 559, 31 So. Rep. 467; Yale v. Saunders, 16 Vt. 232; Sparks v. Purdy, 11 Mo. 219; Reynolds v. Shuler, 5 Cow, 323; Easton v. Woods, 1 Mo. 506; Brady v. Whitney, 24 Mich. 154; Dailey v. Crowley, 5 Lans. 301; Wheelock v. Wheelwright, 5 Mass. 104; Cook v. Loomis, 26 Conn. 483; Hepburn v. Sewell, 5 Har. & J. 211, 9 Am. Dec. 512; Allen v. American Building & L. Ass'n, 49 Minn. 544, 552, 52 N. W. Rep. 144; Wiechers v. Central Trust Co., 80 Hun, 576, 30 N. Y. Supp. 595.

In Sprague v. McKinzie, 63 Barb. 60, the reasoning in which is open to comment, it appeared that B. converted A.'s horse by selling it to D. Without delay A. took the horse from D.; then sued B. in trover for it. It was held that he was entitled to recover the full value, and that evidence of the retaking was not admissible in mitigation.

[2] Bowers v. Bradley, 112 Iowa, 537, 84 N. W. Rep. 534; Plevin v. Henshall, 10 Bing. 24; Irish v. Cloyes, 8 Vt. 39; Sharpe v. Graydon, 99 Ind. 232; Mears v. Cornwall, 73 Mich. 78, 40 N. W. Rep. 931; Storrs v. Robinson, 74 Conn. 443, 51 Atl. Rep. 135; Dahill v. Booker, 140 Mass. 308, 5 N. E. Rep. 496, 54 Am. Rep. 465; Barnett v. Speir, 93 Ga. 762, 21 S. E. Rep. 168; Torry v. Black, 58 N. Y. 185; Meeks v. Simon, 2 N. Y. Misc. 241, 21 N. Y. Supp. 1004; Stone v. Chicago, etc. R. Co., 3 S. D. 330, 336, 53 N. W. Rep.

fact may be shown in mitigation.[1] It is immaterial to the application of this principle whether the property be recaptured by the owner, voluntarily returned and accepted, or bought in by him at a sale.[2] Where a mortgagee sues for the conversion of part of the mortgaged chattels the amount at which he bid in the remaining part of them at a mortgage sale, rather than the amount for which he afterwards sold the same, should be applied in reduction of the mortgage debt in determining the

189; Field v. Munster, 11 Tex. Civ. App. 341, 344, 32 S. W. Rep. 417, quoting the text; Dodson v. Cooper, 37 Kan. 346, 15 Pac. Rep. 200; Farr v. State Bank, 87 Wis. 223, 58 N. W. Rep. 377, 41 Am. St. 40; Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. Rep. 778; Koyer v. White, 6 Tex. Civ. App. 381, 25 S. W. Rep. 46; Coulson v. Panhandle Nat. Bank, 54 Fed. Rep. 855, 4 C. C. A. 616. See Locke v. Garrett, 16 Ala. 698.

A carrier who delivered property, shipped for account of plaintiff and subject to his order, to one who had agreed to purchase it, but who had paid only a portion of the price therefor at the time of its delivery, was permitted to show that after the conversion the vendee had paid for the property, and that the vendor accepted payment with knowledge of the facts. Jellett v. St. Paul, etc. R. Co., 30 Minn. 265, 15 N. W. Rep. 237.

In Morgan v. Kidder, 55 Vt. 367 (approved in Smith v. Anderson, 70 Vt. 424, 41 Atl. Rep. 441), M. sold a herd of cattle, including a yoke of oxen, to G. upon condition that they were to remain his property until they were fully paid for. G. sold the oxen to K., and the latter in an action of trover brought against him for the conversion of the oxen, offered to show in mitigation of damages that the identical money which he paid G. was subsequently paid to the plaintiff and applied upon his lien debt, and it was claimed that this payment should go in mitigation of damages. The court held otherwise. The general rule as stated in the text was fully recognized; but was held inapplicable "because it cannot strictly be said that the avails have gone to the plaintiff's use. The sale and the conversion by the defendant infringed the plaintiff's contract right to have the oxen remain in G.'s possession as security until the whole debt was paid."

The defendant in an action of trover brought by the assignee of a chattel mortgage cannot complain that moneys collected by the plaintiff upon accounts assigned as collateral to the mortgage, instead of being credited thereon, were applied to the payment of other claims against the mortgagor, to secure which the plaintiff held a second assignment of the accounts executed prior to the levy. Hull v. Bernatz, 106 Mich. 551, 64 N. W. Rep. 473.

Partial satisfaction by one tortfeasor mitigates the liability of his co-tortfeasors. Muser v. Lewis, 50 N. Y. Super. Ct. 431.

[1] Clements v. Eiseley. 63 Neb. 651, 88 N. W. Rep. 871. See § 1140.

[2] Field v. Munster, *supra;* Sprague v. Brown, 40 Wis. 620; § 156; R. F. Scott Grocer Co. v. Kelly, 14 Tex. Civ. App. 136, 36 S. W. Rep. 140; Muenster v. Fields, 89 Tex. 102, 33 S. W. Rep. 852; Blewett v. Miller, 131 Cal. 149, 63 Pac. Rep. 157.

amount of his damages.[1] If exempt property converted has been repurchased the whole sum paid therefor should be recovered, and if non-exempt property was also converted, the recovery should be apportioned between the two classes according to their relative value; interest and any special damages proven should also be recovered.[2] If the property is accepted pending the action the defendant may avoid liability for costs, assuming that only nominal damages are recoverable, by tendering judgment therefor and costs up to the time of the tender.[3] One who buys notes of an infant from the attorney of the latter and discounts them otherwise than in good faith is not entitled by way of equitable set-off to more than the attorney had a right to hand over to the infant, or more than he might have properly handed over were he the infant's general guardian.[4]

In some states an unaccepted offer to return converted property is of no avail;[5] but the better rule is otherwise if the wrong was not wilfully done.[6] Where in an action for the conversion of machinery in a workshop, it not appearing that the defendant had ever appropriated it to his own use, or removed it, or had actual possession of it otherwise than by being in the rightful possession of the workshop, and the alleged conversion consisting in a refusal to allow the plaintiff to remove the machinery on demand, a subsequent notice to the plaintiff by the defendant that he relinquished all claim to the machinery was considered in mitigation.[7] If the plaintiff sells the property after conversion, he can recover no more than nominal damages.[8] Where the property is returned an action may, notwithstanding, be brought for the conversion, and the measure of damages as generally held is the market value at the time of the conversion, less such value at the time of the return.[9] It has been so held in Pennsylvania, and that these

[1] Hull v. Bernatz, 106 Mich. 551, 64 N. W. Rep. 473.

[2] Blewett v. Miller, *supra.*

[3] Cernahan v. Chrisler, *supra.*

[4] Petrie v. Williams, 88 Hun, 292, 34 N. Y. Supp. 670, affirmed without opinion, 153, N. Y. 671.

[5] Norman v. Rogers, 29 Ark. 365; Stickney v. Allen, 10 Gray, 352; Mèars v. Cornwall, 73 Mich. 78, 40 N. W. Rep. 931; Allen v. Coates, 29 Minn. 46, 11 N. W. Rep. 132; Gilbert v. Peck, 43 Mo. App. 577.

[6] See § 1141.

[7] Delano v. Curtis, 7 Allen, 470; Bigelow Co. v. Heintze, 53 N. J. L. 69, 21 Atl. Rep. 109.

[8] Brady v. Whitney, 24 Mich. 154.

[9] Lucas v. Trumbull, 15 Gray, 306; Ewing v. Blount, 20 Ala. 694; Irish

are not special damages which should be specially alleged in the declaration.[1] But depreciation in the market price of goods, not being a necessarily natural or legal consequence of the conversion, must be specially alleged.[2] If there has been no depreciation in the value of the property and it had no usable value except for shearing, the expense of which was exceeded by the cost of keeping it, interest on the value during the time of detention may be recovered.[3] The reason of the rule that the value of the goods with interest is the measure of damages where the property has not been restored [530] to the owner is that such value is equal to the goods themselves; and interest thereon is the legal damage for withholding such value. But where the property is returned to the owner the reason for allowing interest ceases after that time; and in place of interest for its previous detention compensation for the use, if valuable, should be allowed.[4] If hire is allowed in lieu of interest it should not be computed by the day for a long period of time.[5] If the property is injured, or suffers deterioration from any cause after the conversion, it is the loss of the wrong-doer, and the owner may recover for it in trover.[6] In such case he cannot compel the owner to receive the property; and if he does so he only receives it in mitigation of

v. Cloyes, 8 Vt. 30, 30 Am. Dec. 446; Renfro's Adm'x v. Hughes, 69 Ala. 581; Green v. Stephens, 37 Mo. App. 641; Gove v. Watson, 61 N. H. 136; Hough v. Bowe, 51 N. Y. Super. Ct. 207; Pollak v. Davidson, 87 Ala. 551, 6 So. Rep. 312; Murphy v. Hobbs, 8 Colo. 17, 11 Pac. Rep. 55; Watson v. Coburn, 35 Neb. 492, 496, 53 N. W. Rep. 477; Stillwell v. Farewell, 64 Vt. 286, 24 Atl. Rep. 243; Bates v. Clark, 95 U. S. 204; Coulson v. Panhandle Nat. Bank, 54 Fed. Rep. 855, 4 C. C. A. 616; Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. Rep. 778, disapproving Collins v. Lowry, 78 Wis. 329, 47 N. W. Rep. 612; Walker v. Fuller, 29 Ark. 448; Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Bigelow Co. v. Heintze, 53 N. J. L. 69, 21 Atl. Rep. 109.

[1] Rank v. Rank, 5 Pa. 211.

[2] Harris v. Finberg, 46 Tex. 79.

[3] Coulson v. Panhandle Nat. Bank, 54 Fed. Rep. 855, 4 C. C. A. 616.

[4] Ewing v. Blount, 20 Ala. 694; Renfro's Adm'x v. Hughes, 69 id. 581; Post v. Munn, 4 N. J. L. 61, 5 Am. Dec. 570; Farrel v. Colwell, 30 N. J. L. 123; Moore v. King, 4 Tex. Civ. App. 397, 23 S. W. Rep. 484; Craddock v. Goodwin, 54 Tex. 588.

[5] Hull v. Davidson, 6 Tex. Civ. App. 588, 25 S. W. Rep. 1047; Hudson v. Wilkinson, 45 Tex. 444.

[6] Jamison v. Hendricks, 2 Blackf. 94, 18 Am. Dec. 131; Field v. Munster, 11 Tex. Civ. App. 341, 32 S. W. Rep. 417; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. Rep. 476, 34 Am. St. 579; Muenster v. Fields, 89 Tex. 102, 33 S. W. Rep. 852.

damages for what it is then worth.[1] One who hires a horse to go to a certain place and drives him beyond is guilty of a conversion, and liable for any decrease in its value occurring after he has passed that point, although it happens by the fault of the horse.[2] If the property after conversion be destroyed, or taken by an officer on process against a third person, it is the loss of the wrong-doer so far as the owner is concerned; the cause of action in his favor is complete at the time and by the act of conversion, and if he is not able to return the property in some mode to the owner he can have no mitigation of damages, but they will be computed by the general rule of the value at the date of conversion and interest.[3] A mortgagor who has taken the mortgaged property otherwise than under the mortgage and claimed to be the absolute owner of it, cannot mitigate his liability because of expense incurred in caring for the property.[4]

§ 1140. Same subject. If there was a wilful taking of the property, or a wilful refusal to surrender it on demand, or it has suffered an injury or deterioration in value, the defendant [**531**] cannot compel the plaintiff to accept it in mitigation of damages.[5] This rule rests on the doctrine that a wrong-doer cannot take from the person wronged his right to pursue any of the legal remedies open to him.[6] But if the property came

[1] Beach v. Raritan, etc. R. Co., 37 N. Y. 457; Mullen v. Ensley, 8 Humph. 428; Hooks v. Smith, 18 Ala. 338; Freer v. Cowles, 44 Ala. 314; Gray v. Crocheron, 8 Port. 191; Seay v. Marks, 23 Ala. 532; Dahill v. Booker, 140 Mass. 308, 310, 5 N. E. Rep. 496, 54 Am. Rep. 465; Nash v. Minnesota Title, Ins. & Trust Co., 163 Mass. 574, 584, 40 N. E. Rep. 1039, 28 L. R. A. 753, 47 Am. St. 489; Rutland & W. R. v. Middlebury Bank, 32 Vt. 639; Bigelow Co. v. Heintze, 53 N. J. L. 69, 21 Atl. Rep. 109.

[2] Perham v. Coney, 117 Mass. 102; Gove v. Watson, 61 N. H. 136.

[3] Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511; Wehle v. Butler, 61 N. Y. 245; Hartmann v. Burtis, 65 App. Div. 481, 483, 72 N. Y. Supp. 914.

[4] Howery v. Hoover, 97 Iowa, 581, 66 N. W. Rep. 772.

[5] Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500; Yale v. Saunders, 16 Vt. 243, note; Fisher v. Prince, 3 Burr. 1363; Olivant v. Perineau, 2 Str. 1191; Shotwell v. Wendover, 1 Johns. 65; Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519; Kelly v. Messier, 21 App. Div. 253, 47 N. Y. Supp. 675; Carpenter v. American Building & L. Ass'n, 54 Minn. 403, 56 N. W. Rep. 95, 40 Am. St. 345; Allen v. Same, 55 Minn. 86, 56 N. W. Rep. 577; Colby v. W. W. Kimball Co., 99 Iowa, 321, 68 N. W. Rep. 786.

[6] Carpenter v. American Building & L. Ass'n, *supra*.

lawfully into the defendant's possession, and his refusal to surrender was qualified, or the conversion technical only, or without intentional wrong, and it remains strictly in the same condition as before the conversion, the defendant may compel the plaintiff to accept it in mitigation.[1] In a late case in Wisconsin [2] the court, by Taylor, J., say: "It has been a well-established rule in the courts of England for more than a century that in actions of trover the court will, under certain circumstances, permit the defendant, after suit brought, to bring the property claimed into court for the defendant,[3] with the costs up to that time, and will then order a stay of proceedings, or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him unless he is able to show that he has been specially damaged by the conversion of the property by the defendant in addition to its value at the time of its return. Or the courts will, in a proper case after verdict, upon a tender of the property, reduce the verdict to nominal damages." This practice has been recognized in several states.[4] The application for such an order is addressed to the discretion of the court.[5] The action must be for a specific chattel, quantity and quality, and unattended with any circumstances that enhance the damages above the real value; it must be a case where the real and ascertained value is the sole measure of damages.[6] Where the offer was to return a part

[1] Bigelow Co. v. Heintze, 53 N. J. L. 69, 77, 21 Atl. Rep. 109, quoting the text; Pickering v. Truste, 7 T. R. 53; Earle v. Holderness, 4 Bing. 462; Tucker v. Wright, 3 id. 601; Whitten v. Fuller, 2 W. Bl. 902; Hayward v. Seaward, 1 Moore & S. 459; Hiort v. London, etc. R. Co., 4 Ex. Div. 188, 195.

[2] Churchill v. Welsh, 47 Wis. 39, 1 N. W. Rep. 398, followed in Warder v. Baldwin, 51 Wis. 450, 459, 8 N. W. Rep. 257; Farr v. State Bank, 87 Wis. 223, 58 N. W. Rep. 377, 41 Am. St. 40; Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. Rep. 778.

[3] "Defendant" should read "plaintiff."

[4] Bucklin v. Beals, 38 Vt. 653; Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500; Rutland, etc. R. Co. v. Bank, 32 Vt. 639; Cook v. Loomis, 26 Conn. 483; Rogers v. Crombie, 4 Me. 274; Tracey v. Good, 1 Clark (Pa.), 472; Shotwell v. Wendover, 1 Johns. 65; Stevens v. Low, 2 Hill, 132; Thayer v. Manley, 8 Hun, 550; McGraw v. Sampliner, 107 Mich. 141, 64 N. W. Rep. 1060; Watson v. Coburn, 35 Neb. 492, 53 N. W. Rep. 477; Coburn v. Watson, 48 Neb. 257, 67 N. W. Rep. 171; Carpenter v. American Building & L. Ass'n, 54 Minn. 403, 410, 56 N. W. Rep. 95, 40 Am. St. 345.

[5] Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500; Churchill v. Welsh, 47 Wis. 39, 1 N. W. Rep. 398.

[6] Fisher v. Prince, 3 Burr. 1364; Whitten v. Fuller, 2 W. Bl. 902;

of the number of books converted, and the offer was refused because all the books were not returned, it was ruled that, as each copy was a separate and distinct piece of property, the plaintiff was bound to accept such as were tendered in good condition, and could only recover for the number not so tendered.[1] The wrong-doer cannot entitle himself to a reduction of damages by applying the property or its proceeds to the plaintiff's [532] use without his consent.[2] And the fact that the defendant was a creditor of the plaintiff and took the property to satisfy the debt, or under void process, or by void service of valid process for such a purpose, will not, in England and some of the states of the Union, mitigate the injury or reduce the damages.[3] The converter cannot mitigate the damages by applying the property to the use of another against whom the owner has legal recourse for its recovery, but against whom he does not elect to proceed.[4] An officer cannot mitigate his liability by showing that he sold the property under a mortgage while it was in his possession under an attachment levy if notices of the sale were not posted according to law; neither can the costs of the sale be deducted.[5]

Tucker v. Wright, 3 Bing. 601; Gibson v. Humphrey, 1 Cr. & M. 544.

[1] Young Men's Christian Ass'n v. Harmon, 61 Ill. App. 639.

[2] Wanamaker v. Bowes, 36 Md. 42; Sowell v. Champion, 6 Ad. & E. 407; Northrup v. McGill, 27 Mich. 234; Dalton v. Laudahn, id. 529; Bringard v. Stellwagen, 41 id. 54; Isaacs v. McLean, 106 Mich. 79, 64 N. W. Rep. 2; Smith v. Hartog, 23 N. Y. Misc. 353, 51 N. Y. Supp. 257; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. Rep. 476, 34 Am. St. 579; Smith v. Anderson, 70 Vt. 424, 41 Atl. Rep. 441.

[3] Kelley v. Archer, 48 Barb. 68; Butts v. Edwards, 2 Denio, 164; Earl v. Spooner, 3 Denio, 246; Gillard v. Brittan, 8 M. & W. 576; White v. Binstead, 76 Eng. C. L. 304; Attack v. Bramwell, 3 B. & S. 520; East v. Pace, 57 Ala. 521; Northrup v. McGill, 27 Mich. 234.

In Edmondson v. Nuttall, 17 C. B. (N. S.) 280, it appeared that the plaintiff had certain looms in the defendant's mill and demanded possession of them, the defendant having no right to detain them. The defendant, however, having obtained a judgment against the plaintiff in the county court, in respect of which he would be entitled to issue execution against him on the next day, refused to deliver them up, and the looms were taken in execution on the following morning and sold. In an action for this wrongful conversion, held, that the liability of the looms to the county court process and the fact that by the wrongful seizure the plaintiff's debt was (apparently) satisfied were not circumstances which the jury could take into consideration in estimating the damages.

[4] First Nat. Bank v. Lyman, 59 Kan. 410, 53 Pac. Rep. 125.

[5] Chezum v. Parker, 19 Wash. 645, 54 Pac. Rep. 22.

§ 1141. Same subject. A different and more liberal [533] rule generally prevails in this country. Where the defendant, in an honest and *bona fide* endeavor to enforce a right, or a supposed right, or to exercise a power, deals with the property in such a manner as constitutes a conversion, either because the right or the power was wholly or partially wanting or has been exceeded or irregularly asserted or exercised, the courts [534] generally consider the whole transaction, and only award such damages as are necessary for complete reparation.[1] Thus, in disposing of property rightfully distrained for rent, a step was omitted which made the sale irregular, legally a conversion; but the defendant was permitted to recoup the rent which the sale was made to satisfy, or have it deducted in mitigation.[2] [535] An officer by abuse of his process of execution was held to be a trespasser from the beginning, but was allowed in mitigation to prove the amount of the proceeds he had applied on the judgment.[3] A tax collector became a purchaser at his own sale, which was held voidable for that reason; but in trover by the owner of the property against him the amount of the tax paid was deducted from the damages.[4] An officer sold without giving notice, and was held liable as for a conversion; but the proceeds having been applied to the owner's debt, he was held entitled to recover only the damage suffered from the failure to give such notice; this was supposed to be that a less price was obtained for the property.[5] An executor sold property of the estate before the will was probated, and under circumstances which would not have been justifiable if probate of it had been made, and which sale was not legalized by the subsequent proof of the will. The money received was paid into and remained with the funds of the estate. The purchaser's liability was thereby mitigated.[6] In an action of trover against an attaching creditor and the officer, it appeared that after the levy upon the property the attachment was abandoned and the indorsement of service erased. With-

[1] The text is quoted with approval in Farr v. State Bank, 87 Wis. 223, 226, 58 N. W. Rep. 377.

[2] Tripp v. Grouner, 60 Ill. 474; Ball v. Campbell, 30 Kan. 177, 2 Pac. Rep. 165.

[3] Lamb v. Day, 8 Vt. 407, 30 Am. Dec. 479.

[4] Pierce v. Benjamin, 14 Pick. 356.

[5] Wright v. Spencer, 1 Stew. 576, 18 Am. Dec. 76.

[6] Thomas v. New York L. Ins. Co., 50 N. Y. Super. Ct. 225.

out being surrendered the property was taken on a new writ for the same creditor and debt, and after judgment sold on execution and the proceeds applied to satisfy it. The action was brought for a conversion by the original taking. As the defendants could not justify, they suffered judgment by default, and on the assessment of damages claimed the right to show such subsequent disposition of the property in mitiga- [536] tion, and were allowed to do so. The court, by Waite, J., say: "If goods are tortiously taken and a creditor of the owner afterwards attaches them, and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking, but in mitigation of damages. For it would be palpably unjust for the owner to receive the full value of his goods in their application to the payment of his debts, and then afterwards recover that value from another who has received no substantial benefit from his property. This rule is not only in conformity with justice, but has the sanction of authority."[1] The case was held to be within the reason of that rule, although the subsequent process was in favor of one of the defendants, and executed by the other. "The plaintiff," the learned judge continued, "has no more right to complain of a second attachment than he would if made by any other creditor, or if there had been no previous taking of the property. When the goods were attached the second time the copy left in service with him showed their situation. It was then at his option to regain the possession either by writ of replevin or by payment of the debt upon which they were attached, or suffer them to be applied in satisfaction of that debt. Had he obtained his goods in either

[1] Curtis v. Ward, 20 Conn. 204; Bates v. Courtwright, 36 Ill. 518.

In Wehle v. Butler, 12 Abb. Pr. (N. S.) 139, it was held that evidence of payment, or of application of the fund in suit to plaintiff's benefit, cannot be introduced under a general denial (in code pleading); that if a defendant, when sued for a conversion of goods, sets up a subsequent valid sale on execution in favor of the defendant and against the plaintiff it constitutes a defense, does not go in mitigation of damages and must be specially pleaded. Murray v. Burling, 10 Johns. 172; Baker v. Freeman, 9 Wend. 39, 24 Am. Dec. 117; Baldwin v. Porter, 12 Conn. 473; Ford v. Williams, 24 N. Y. 359; Hurlburt v. Green, 41 Vt. 490; McInvoy v. Dyer, 47 Pa. 118; Tamvaco v. Simpson, 19 C. B. (N. S.) 453; Kaley v. Shed, 10 Met. 317.

of the former modes, it would hardly be claimed that he could afterwards recover their value of the defendants. The same result ought to follow if he suffers them to be applied in due form of law to the payment of his debt." This is in accordance with the course of decision in some other states.[1] It will be proper now to notice some limitations upon this right. A tort-feasor cannot mitigate his liability by proving the mere levy of an execution or attachment upon property by the creditor of its owner. He must go farther and show that the owner had the benefit of the property in such a way as to operate in law as a restoration of it.[2] In New York and some other states the application of the property in satisfaction of a judgment does not mitigate the wrong-doer's liability if his act was done in collusion with the creditor whose judgment is satisfied, or if the latter participated in such act.[3] If the converted property is exempt from the demands of creditors the application of it in satisfaction of a judgment against the owner does not affect the liability of the wrong-doer.[4] But if there is a limitation upon the value of the property which may be claimed as exempt and non-divisible property, exempt and not exempt, is sold, the damages cannot exceed the amount specified as the limit of the exemption.[5] There is no abatement of an officer's liability for the full value of a mortgagee's property because he sold it to the mortgagor who keeps possession of it. The delivery to the latter was as purchaser, not as mortgagor, and his possession was under his new title, and adverse to the mortgagee.[6] The sureties upon the bond of an executor who converts securities belonging to the estate cannot lessen their liability by claiming the commissions which would have been due him if he had not misconducted himself.[7] A

[1] Stewart v. Martin, 16 Vt. 397; Board v. Head, 3 Dana, 489; Hopple v. Higbee, 23 N. J. L. 342; Morrison v. Crawford, 7 Ore. 472; Howard v. Manderfield, 31 Minn. 337, 17 N. W. Rep. 946; Mississippi Mills v. Meyer, 83 Tex. 433, 18 S. W. Rep. 748; Jones v. Cobb, 84 Me. 153, 24 Atl. Rep. 798.

[2] Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57, 25 N. E. Rep. 294, 20 Am. St. 718; Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511; Watson v. Coburn, 35 Neb. 492, 497, 53 N. W. Rep. 477; Coburn v. Watson, 48 Neb. 257, 67 N. W. Rep. 171.

[3] Wehle v. Spelman, 25 Hun, 99; § 1105.

[4] Cone v. Lewis, 64 Tex. 331.

[5] State v. Harrington, 33 Mo. App. 476.

[6] Leonard v. Hair, 133 Mass. 455.

[7] State v. Berning, 74 Mo. 87.

wrong-doer cannot reap any benefit from payments made by a third party out of the proceeds realized from the sale of the converted property. Thus, where trover was brought by the mortgagee of crops against a purchaser with notice he was not allowed to mitigate his liability by proving that a portion of the proceeds received by the mortgagor was applied by him to the payment of rent, the lien of the landlord therefor being superior to that of the mortgagee.[1] "When the owner has recovered converted property the measure of his damages is the expense he has necessarily incurred, and the value of the time he has spent in recovering it, together with the value of the use of the property, if any, while he was wrongfully deprived of it, not exceeding the total value of the property at the time of the conversion," and, in addition, for any depreciation in the value of it between the time of the [537] conversion and return.[2] He may recover for money paid to satisfy an exaction of one having the property to obtain possession,[3] or at a wrongful public sale.[4] The sums so paid detract from the benefit the defendant will derive by way of mitigation of damages from its return.[5] He will be entitled to a deduction from the damages which would otherwise be recoverable for any partial satisfaction of the wrong made by him, or by any of several jointly charged with or guilty of the same conversion and accepted by the plaintiff. Where in such a case against two the plaintiff obtained judgment by

[1] Keith v. Ham, 89 Ala. 590, 7 So. Rep. 234; Carpenter v. Going, 20 Ala. 587.

[2] First Nat. Bank v. Rush, 85 Fed. Rep. 539, 29 C. C. A. 333; Dodson v. Cooper, 37 Kan. 346, 15 Pac. Rep. 200; Sprague v. Brown, 40 Wis. 612; Curtis v. Ward, 20 Conn. 204; Hurlburt v. Green, 41 Vt. 490; United States v. Pine River Logging & Imp. Co., 78 Fed. Rep. 319, 24 C. C. A. 101.

[3] Hough v. Bowe, 51 N. Y. Super. Ct. 207; Davis Sewing Machine Co. v. Best, 50 Hun, 76. 4 N. Y. Supp. 510; Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532; Renfro's Adm'x v. Hughes, 69 Ala. 581; Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Ewing v. Blount, 20 Ala. 694; McDonald v. North, 47 Barb. 530; Sprague v. Brown, 40 Wis. 612. See Sprague v. McKinzie, 63 Barb. 60; Parroski v. Goldberg, 80 Wis. 339, 50 N. W. Rep. 191, qualifying Collins v. Lowry, 78 Wis. 329, 47 N. W. Rep. 612.

[4] Keene v. Dilke, 4 Ex. 388.

[5] Hurlburt v. Green, 41 Vt. 490; Baldwin v. Porter, 12 Conn. 473.

There cannot be a recovery of expenses incurred in anticipation of operating a machine without knowledge of its conversion unless the demand therefor is special. Cushing v. Seymour, 30 Minn. 301, 15 N. W. Rep. 249.

default against one and withdrew his action against the other upon receiving partial satisfaction and agreeing no further to prosecute him personally therefor, it was held that damages might be assessed against the defaulted defendant for the value of the converted property, deducting therefrom the amount received by way of compromise from his co-defendant.[1]

§ 1142. Plaintiff's duty to mitigate damages. The rights and liabilities of parties to actions for the conversion of property are determined by the facts existing at the time and place of conversion, with an exception or two, such as those which allow the highest intermediate value of the property to be recovered. The modification of the rule which allowed that value to be fixed as of any time between the conversion and the time of the trial of the action therefor to a reasonable time after the wrong has been done may be considered an application of the principle which imposes upon the wronged party the duty to lessen the damages which may result from the act of the other. How far this principle may apply to actions of this class is a question upon which the authorities do not throw much light. We incline to the view that it is not applicable, except in unusual circumstances, as where loss of profits or other consequential damages are claimed. Property reduced to rightful possession is the subject of ownership. He who interferes with the owner's rights therein must compensate him for the wrong done. The injured person who has been deprived of a deer or a fish he has taken is not bound to relieve the wrong-doer of his duty to pay the value thereof because the woods abound in deer or the waters are filled with fish. One who appropriates ice formed on public waters, in a mode recognized by persons engaged in securing ice thereon, is entitled to recover its value if another enters upon and cuts that so appropriated, regardless of the quantity which he may be at liberty to secure elsewhere. Some light may be gathered on this question from the cases referred to in the note.[2]

[1] Heyer v. Carr, 6 R. I. 45.

[2] Taber v. Jenny, 1 Sprague, 320; Bourne v. Ashley, 1 Low. 27; Bartlett v. Budd, id. 223; Ghen v. Rich, 8 Fed. Rep. 159; Swift v. Gifford, 1 Low. 29.

CHAPTER XXIX.

REPLEVIN.

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PLAINTIFF'S CASE.

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SECTION 1.

PLAINTIFF'S CASE.

[538] **§ 1143. Definitions; who may sue.** Replevin and detinue are common-law actions for the recovery of specific personal property. The former enables the plaintiff to obtain possession at the commencement of the suit on giving security to prosecute it and to return the property if return be adjudged; the other enforces delivery of the property by the final judgment and the process thereon. The remedy by claim and delivery under the code combines substantially the advantages of both these actions.[1]

One who owns and is entitled to the possession of personal

[1] See McLaughlin v. Piatti, 27 Cal. 451; Morgan v. Reynolds, 1 Mont. 163.

property may bring replevin against whomsoever he finds in possession of it or who assumes control of the property by refusing to surrender it on demand.[1] According to the weight of authority an action to recover specific personal property cannot be maintained unless the defendant was in possession of it when the action was begun.[2] In New York the rule is otherwise.[3] In Wisconsin the action lies if the defendant disposed of the property after demand was made.[4]

§ **1144. Measure of damages.** Where the plaintiff obtains possession on his writ of replevin, as is usually the case where the defendant has no legal right to retain it by giving bond, and on the trial maintains his right to it, if the property is obtained without injury or deterioration he is only entitled to damages for its caption and detention. There cannot be a recovery for the breach of the contract out of which grew the dispute as to the right of possession.[5] The ordinary measure of these damages is interest on the value of the property.[6]

[1] Christy v. Ashlock, 93 Ill. App. 651; Harris v. Smith, 132 Cal. 316, 64 Pac. Rep. 409.

[2] Heidiman-Benoist Saddlery Co. v. Schott, 59 Neb. 29, 80 N. W. Rep. 47; Burr v. McCallum, 59 Neb. 326, 80 N. W. Rep. 1040; Moses v. Morris, 20 Kan. 208; State v. Jennings, 14 Ohio St. 73; Willis v. De Witt, 3 S. D. 281, 52 N. W. Rep. 1090; McHugh v. Robinson, 71 Wis. 565, 37 N. W. Rep. 426; Gardner v. Brown, 22 Nev. 156, 168, 37 Pac. Rep. 240; Coffin v. Gephart, 18 Iowa, 257; Riciotto v. Clement, 94 Cal. 105, 29 Pac. Rep. 414; Haughton v. Newberry, 69 N. C. 456; Hall v. White, 106 Mass. 599; Aber v. Bratton, 60 Mich. 357, 27 N. W. Rep. 564; Griffin v. Lancaster, 59 Miss. 340; Davis v. Randolph, 3 Mo. App. 454; Feder v. Abrahams, 28 id. 454.

[3] Nichols v. Michael, 23 N. Y. 264; Barnett v. Selling, 70 N. Y. 492.

[4] Starke v. Paine, 85 Wis. 633, 55 N. W. Rep. 185; Pranke v. Herman, 76 Wis. 428, 45 N. W. Rep. 312; Oleson v. Merrill, 20 Wis. 462, 91 Am. Dec. 428; Gassner v. Marquardt, 76 Wis. 579, 45 N. W. Rep. 674.

[5] Hersberg v. Sachse, 60 Md. 426; Schrandt v. Young, 62 Neb. 254, 86 N. W. Rep. 1085.

In Iowa the right to damages for the detention is not waived by exercising the statutory privilege of taking judgment for the value of the property instead of for its return. Cook v. Hamilton, 67 Iowa, 394, 25 N. W. Rep. 676. Compare Hanselman v. Kegel, 60 Mich. 540, 27 N. W. Rep. 678; Just v. Porter, 64 Mich. 565, 31 N. W. Rep. 444.

[6] Brizsee v. Maybee, 21 Wend. 144; State v. Smith, 31 Mo. 566; Bigelow v. Doolittle, 36 Wis. 115; Gillies v. Wofford, 26 Tex. 76; New York Guaranty, etc. Co. v. Flynn, 55 N. Y. 653; McDonald v. Scaife, 11 Pa. 381, 51 Am. Dec. 556; Robinson v. Barrows, 48 Me. 186; Oviatt v. Pond, 29 Conn. 479; Schenuit v. Bruegestradt, 8 Mo. App. 46; Hainer v. Lee, 12 Neb. 452, 11 N. W. Rep. 888; Redmond v. American Manuf. Co., 121 N. Y. 415, 24 N. E. Rep. 924; Johnson

This rule will be applied to securities not bearing interest, the detention of which prevents the owner from collecting the money they represent, or of making demand so as to put them upon interest if payment should be delayed.[1] This rule, how- [539] ever, is not inflexible. Following the principle that the injured party is entitled to just compensation only, when there is no injury, or but a slight one, the damages will be only nominal or according to the injury actually sustained. If securities for money bearing interest at the legal rate are detained and the interest has not been paid, no more than nominal damages can be recovered.[2] Where corporate stock was the subject of the action and by statute the value at the date of the trial was recoverable, it was held that, in addition, the plaintiff was entitled to the dividends that had been paid upon the stock as damages for the detention.[3]

Interest on the value will not be adequate compensation and is not the measure of damages where the use of the property detained is valuable. The owner is entitled to recover

v. Bailey, 17 Colo. 59, 28 Pac. Rep. 81; Werner v. Graley, 54 Kan. 383, 38 Pac. Rep. 482; Austin v. Terry, 13 Colo. App. 141, 56 Pac. Rep. 810; Smith v. Stevens, 14 Colo. App. 491, 60 Pac. Rep. 580; Morey v. Hoyt, 62 Conn. 542, 558, 26 Atl. Rep. 127; Earle v. Gorham Manuf. Co., 2 App. Div. 460, 473, 37 N. Y. Supp. 1037; Crossley v. Hojer, 11 N. Y. Misc. 57, 31 N. Y. Supp. 837; Bourda v. Jones, 110 Wis. 52, 85 N. W. Rep. 671; Honaker v. Vesey, 57 Neb. 413, 77 N. W. Rep. 1100; Gardner v. Brown, 22 Nev. 156, 169, 89 N. W. Rep. 507; Klinkert v. Fulton Storage & M. Co., 113 Wis. 493, 89 N. W. Rep. 507; Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. Rep. 436; Wadleigh v. Buckingham, 80 Wis. 230, 49 N. W. Rep. 745; State Bank v. Showers, 65 Kan. 431, 70 Pac. Rep. 332.

In Delaware the allowance of interest is discretionary with the jury. Boyce v. Cannon, 5 Houst. 409. And so in North Carolina. Patapsco Guano Co. v. Magee, 86 N. C. 350. In California if there is a recovery for the detention of property interest on its value from the date of the taking, if allowable at all, is to be allowed as damages for detention. Garcia v. Gunn, 119 Cal. 315, 51 Pac. Rep. 689.

[1] McCoy v. Cornell, 40 Iowa, 457; Wegner v. Second Ward Savings Bank, 76 Wis. 242, 44 N. W. Rep. 1096.

In the last case there was a detention of a depositor's pass-book; his deposit had been paid to a stranger. The legal rate of interest was recovered though the bank was to pay less.

[2] Bartlett v. Brickett, 14 Allen, 62.

If the value of the note sued is alleged to be the principal sum due thereon and the bond and affidavit follow the complaint there cannot be a recovery of interest on the note which has accrued before the action was brought. Peterson v. Hall, 61 Minn. 268, 63 N. W. Rep. 733.

[3] Bercich v. Marye, 9 Nev. 312.

the value of the use if he prefers it to interest, during the time he was deprived of possession,[1] though in some cases it must be shown that, but for the detention, the owner would have used the property.[2] Without alleging special injury the plaintiff may recover in replevin such damages for the detention of the property as the jury, upon all the evidence, may be satisfied that its use, considering its nature and character, was worth during the time of the detention.[3] In North

[1] Minkwitz v. Steen, 36 Ark. 260; Cook v. Hamilton, 67 Iowa, 394, 25 N. W. Rep. 676; Turner v. Younker, 76 Iowa, 285, 41 N. W. Rep. 10; Kennett v. Fickel, 41 Kan. 211, 21 Pac. Rep. 93; Aber v. Bratton, 60 Mich. 357, 27 N. W. Rep. 564; Anchor Milling Co. v. Walsh, 24 Mo. App. 97; Reno v. Kingsbury, 39 id. 240; Chauvin v. Valiton, 8 Mont. 451, 466, 20 Pac. Rep. 658, 3 L. R. A. 194; Corn Exchange Nat. Bank v. Blye, 56 Hun, 403, 10 N. Y. Supp. 151; Coffin v. Taylor, 16 Ore. 375, 18 Pac. Rep. 638; Stanley v. Donoho, 16 Lea, 492; Washington Ice Co. v. Webster, 62 Me. 341, 362, 16 Am. Rep. 462; Odell v. Hole, 25 Ill. 204; Clark v. Martin, 120 Mass. 543; Davis v. Davis, 30 Ga. 296; Morgan v. Reynolds, 1 Mont. 163; Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641; Carroll v. Pathkiller, 3 Port. 279; Fralick v. Presley, 29 Ala. 463, 65 Am. Dec. 413; Dorsey v. Gassaway, 2 Har. & J. 413, 3 Am. Dec. 557; Scott v. Elliott, 63 N. C. 215; Clapp v. Walter, 2 Tex. 130; Clements v. Glass, 23 Ga. 395; Butler v. Mehrling, 15 Ill. 488; Machette v. Wanless, 2 Colo. 180; Hanover v. Bartels, id. 514; McGavock v. Chamberlain, 20 Ill. 219; Dunnahoe v. Williams, 24 Ark. 264; Electric Lighting Co. v. Rust, — Ala. —, 31 So. Rep. 486; Werner v. Graley, 54 Kan. 383, 38 Pac. Rep. 482; Williams v. Wood, 61 Minn. 194, 63 N. W. Rep. 492; Qualy v. Johnson, 80 Minn. 408, 83 N. W. Rep. 393; Nash v. Larson, 80 Minn. 458, 83 N. W. Rep. 451; Cook v. Clary, 48 Mo. App. 166; Farrar v. Eash, 5 Ind. App. 238, 31 N. E. Rep. 1125; Hoyt v. Fuller, 104 Fed. Rep. 192, 43 C. C. A. 466; Fullerton Lumber Co. v. Spencer, 81 Iowa, 549, 46 N. W. Rep. 1058; Hutchinson v. Hutchinson, 102 Mich. 635, 61 N. W. Rep. 60; Chase County Nat. Bank v. Thompson, 54 Kan. 307, 38 Pac. Rep. 274; State Bank v. Showers, 65 Kan. 431, 70 Pac. Rep. 332; Roach v. Houston, 15 Ky. L. Rep. 61 (Ky. Super. Ct.). See Twinam v. Swart, 4 Lans. 263.

[2] Barney v. Douglass, 22 Wis. 464; Smith v. Stevens, 14 Colo. App. 491, 60 Pac. Rep. 580.

[3] Boston Loan Co. v. Myers, 143 Mass. 446, 9 N. E. Rep. 805; Clark v. Martin, 120 Mass. 543; Farrand & V. Organ Co. v. Board of Church Extension, 17 Utah, 469, 474, 54 Pac. Rep. 818, citing the text.

It has been held that the failure to claim damage in a declaration in replevin is a fatal defect. Faget v. Brayton, 2 Har. & J. 350; Crosse v. Bilson, 6 Mod. 102. See Smith v. Dodge, 37 Mich. 354.

In Minnesota the value of the use cannot be recovered unless it is specially claimed (Gray v. Bullard, 22 Minn. 278; Ferguson v. Hogan, 25 id. 135), unless the defect is waived, as it is where the parties litigate the question as though it was a proper issue. That being done, the question cannot be raised by an exception to the charge. Qualy v. Johnson, 80 Minn. 408, 83 N. W. Rep. 393.

Dakota the plaintiff's right to recover for the use of usable property is absolute. The defendant's bond is conditioned for its delivery, and if the plaintiff recovers he takes an alternative judgment, and may insist upon a delivery if it can be had; the defendant has the correlative right. The ownership of the plaintiff continues throughout the proceedings and the right to the value of the use of the property follows the title.[1] Where the complaint demands compensation for the use and specifies the time during which the plaintiff was deprived of the use of the property, it is not necessary that it set out the reasons why the use was more valuable on one day than another. Evidence of an unusual demand for the use of property at a given time is not speculative nor is it based upon prospective profits which might have been made.[2] As between vendor and vendee, the former holding the title until the property is paid for, the latter is liable for the value of the use from the time he refuses to deliver until verdict, regardless of any compensation due him from the vendor for services rendered by the use of the property while the vendee was legally in possession of it, and of payments made under the contract of purchase.[3] There is no right in a mere pledgee[4] or mortgagee[5] to recover the value of the use. Where

The rule in Idaho seems to be like that in Minnesota. Sebree v. Smith, 2 Idaho, 329, 16 Pac. Rep. 915.

An assessment of damages is not necessarily erroneous because the allowance for the detention of the property is in excess of its value. Washburn v. Roberts, 72 Ind. 213.

Where the detention continued for two years and five months the allowance of five times the value of the property was held excessive. Anchor Milling Co. v. Walsh, 24 Mo. App. 97. And where more than twice the value of the property was allowed, no deterioration being shown, the assessment was set aside. Romberg v. Hughes, 18 Neb. 579, 26 N. W. Rep. 351. See Farrar v. Eash, 5 Ind. App. 238, 31 N. E. Rep. 1125.

It is error to instruct the jury to allow the reasonable value of the use or hire of the property without directing its attention to the consideration of whether the property could have been constantly employed at a given rate, or whether its gross earnings would have been diminished by the expense of caring for it. Brunell v. Cook, 13 Mont. 497, 34 Pac. Rep. 1015.

In fixing the reasonable value of

[1] Northrup v. Cross, 2 N. D. 433, 51 N. W. Rep. 718.

[2] Hill v. Wilson, 8 N. D. 309, 79 N. W. Rep. 150.

[3] McGinnis v. Savage, 29 W. Va. 363.

[4] McArthur v. Howett, 72 Ill. 358; Johnson v. Bailey, 17 Colo. 59, 68, 28 Pac. Rep. 81.

[5] Thompson v. Scheid, 39 Minn. 102, 38 N. W. Rep. 801, 12 Am. St. 619; Klinkert v. Fulton Storage & M. Co., 113 Wis. 493, 89 N. W. Rep. 507.

the value at the time of the taking is adopted and interest is added to that it is erroneous to give compensation also for the use between the taking and the trial;[1] and so where the value of the property at the time of the trial is the test.[2] There is no right to recover for the use beyond the time the verdict is rendered.[3] If the property was mortgaged the mortgagor's right to damages for its detention cannot extend beyond the period when his right of possession ceased.[4] Where the property involved is manufactured for sale there is no presumption that the plaintiff would have put it to any use which would have been more profitable to him than the interest on its value; hence, that will limit his recovery.[5] He may [**540**] recover for the use of property while it is detained, but not in addition for the natural depreciation in its value while in the defendant's possession.[6]

If there is a wrongful levy upon and sale of property and the owner purchases it his damages are measured by the price paid; the defendant cannot be heard to allege that the actual value was less than that.[7] Expense incurred in replacing the property is spoken of in at least one case as an element of damage.[8] In replevin for materials, which, before their removal, composed a fence attached to and a part of the realty the plaintiff can recover only the value of the materials after their removal, not the value of the fence as it stood before the removal.[9] But where a house was sold, removed and placed upon a permanent foundation it was held that the re-

the use of property the taxes which the prevailing party would have paid had he retained possession of it and the usual risk incident to possession should be considered. Sebree v. Smith, 2 Idaho, 329, 16 Pac. Rep. 915.

[1] Bigelow v. Doolittle, 36 Wis. 115; Freeborn v. Norcross, 49 Cal. 313; White v. Sheffield, etc. R. Co., 90 Ala. 253, 7 So. Rep. 910; Hanselman v. Kegel, 60 Mich. 540, 27 N. W. Rep. 678.

[2] Reno v. Kingsbury, 39 Mo. App. 240.

[3] Coffin v. Taylor, 16 Ore. 375, 18 Pac. Rep. 638.

[4] Gaar, Scott & Co. v. Lyons, 99 Ky. 672, 37 S. W. Rep. 73.

[5] Redmond v. American Manuf. Co., 121 N. Y. 415, 24 N. E. Rep. 924, 56 N. Y. Super. Ct. 372, 3 N. Y. Supp. 823.

[6] Odell v. Hole, 25 Ill. 204; Mayberry v. Cliffe, 7 Cold. 117; White v. Sheffield, etc. R. Co., 90 Ala. 353, 7 So. Rep. 910.

[7] Leonard v. Maginnis, 34 Minn. 506, 26 N. W. Rep. 733; Northrup v. Cross, 2 N. D. 433, 51 N. W. Rep. 718.

[8] Klinkert v. Fulton Storage & M. Co., 113 Wis. 493, 89 N. W. Rep. 507.

[9] Pennybecker v. McDougal, 48 Cal. 160.

covery should "have been the value of the house, not the house itself.[1] The damages for the detention of a building are not measured by its rental value, but by the damages in fact sustained.[2] In an action of claim and delivery for standing trees, sold as personal property, and which the defendant cut and removed, their salable value at the time they were cut measured the recovery.[3]

§ 1145. Exemplary damages. These may be recovered where the taking is accompanied with outrage and insult or the detention is aggravated by bad faith and oppression.[4] On the question of damages, the means by which the goods have been taken or retained will be considered. In Pennsylvania damages beyond the value of the property may be given in replevin where the taking was accompanied with any wrong or outrage, though the declaration contains no count for special damages, nor any averment of such aggravation;[5] and the same rule has been recognized in Mississippi[6] and New York.[7] In Iowa the purchaser of mortgaged property is not liable to the mortgagee for exemplary damages because he refused to deliver and maliciously concealed it.[8] Such damages may be awarded in California although the plaintiff obtains possession of the property under provisional process.[9] Where the replevin suit has been decided against the plaintiff and *retorno* awarded, and the defendant therein has recovered judgment upon the replevin bond, which judgment has been paid, such defendant cannot maintain another suit to recover punitive damages for the institution of the replevin suit and the execution of the writ.[10]

[1] Reese v. Jared, 15 Ind. 142, 77 Am. Dec. 88.

[2] Eastman v. Commissioners, 114 N. C. 524, 19 S. E. Rep. 599.

[3] Hogg v. Frazier, 24 Ky. L. Rep. 930, 70 S. W. Rep. 291.

[4] Heard v. James, 49 Miss. 236; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636; Schofield v. Ferrers, 46 Pa. 438; Burrage v. Melson, 48 Miss. 237; Cable v. Dakin, 20 Wend. 172; McDonald v. Scaife, 11 Pa. 381, 51 Am. Dec. 556; Gross v. Hays, 73 Tex. 515, 11 S. W. Rep. 523; Arzaga v. Villalba, 85 Cal. 191, 24 Pac. Rep. 656; Wiley v. McGrath, 194 Pa. 498, 45 Atl. Rep. 331, 75 Am. St. 709.

[5] Schofield v. Ferrers, 46 Pa. 438.

[6] Burrage v. Melson, 48 Miss. 237.

[7] Cable v. Dakin, 20 Wend. 172; Brizsee v. Maybee, 21 Wend. 144.

[8] McDonald v. Norton, 72 Iowa, 652, 34 N. W. Rep. 458.

[9] Arzaga v. Villalba, 85 Cal. 191, 24 Pac. Rep. 656.

[10] Kapischki v. Koch, 79 Ill. App. 238, 180 Ill. 44, 54 N. E. Rep. 179.

§ 1146. Special and consequential damages. There may be a recovery of such special and consequential damages as arise naturally and proximately from the wrongful caption or detention of property.[1] A very interesting case involving the remoteness of damage was decided in the supreme court of Victoria in 1887. The plaintiff was indebted to the defendant on three several accounts, one of which was secured by title deeds to lands owned by the former, which were deposited with the latter. The defendant insisted upon the payment of more than was due it, and refused to deliver the deeds. The plaintiff made an arrangement with his mother for the loan of 600*l.* to lift the deeds held by the defendant and carry on his business. The defendant was informed that one-half of said sum was in possession of the plaintiff for the purpose stated, and that the other one-half was to be delivered to him on his delivery of the deeds to the lender, and that, failing to deliver them, the money in hand was to be returned. The court said: We think this evidence shows that the manager of the defendant bank, at the time he did the wrongful act of refusing to deliver up the deeds, had reasonable means of knowing that the consequence of the inability of the plaintiff to obtain the loan from his mother was likely to follow the refusal, and even if the inability to procure a loan could not be considered to be a natural or ordinary consequence of such an act of refusal, that he had then the reasonable means of knowing that this unusual consequence was likely to occur as a result of his wrongful act; if so, the evidence relating to the inability to procure the loan, the refusal of the loan, the insistence by the mother on the return of the money, is admissible in evidence, and is not too remote. The continuation of the wrongful act was the cause of the other damages complained of. The plaintiff was unable to pay his workmen, and had to discharge some. He was unable to meet his liabilities; he appears to have been sued for some debts; he was unable to collect the debts due to him, and his business fell away. We think all these consequences naturally followed from his inability to procure the loan from his mother; and unless it can be shown that he himself conduced by his own conduct or omissions to swell the

[1] Schofield v. Ferrers, 46 Pa. 438.

amount of damage, these damages would be the natural and ordinary consequences of the first damage resulting from the detention of his deeds.[1] Under a statute providing that when judgment is given for the plaintiff he shall recover damages for the detention of the property, there may be a recovery for the depreciation in the value of bonds between the time he became entitled to their possession and the time of receiving them.[2]

[541] In replevin to recover possession of a heifer secretly taken from the plaintiff by the defendant damages were held recoverable for time spent and expenses incurred in searching for the heifer after she was so taken; but such damages should be specially alleged,[3] as should expense incurred in keeping the property.[4] The defendant is not usually liable for the personal expenses of the plaintiff, or his loss of time in connection with

[1] O'Connor v. Bank, 13 Vict. L. R. 820. In reaching its conclusion the court accepted the test as to what damage is too remote laid down by Bovill, C. J., in Sharp v. Powell, L. R. 7 C. P. 258, 41 L. J. (C. P.) 95: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that the consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person."

[2] Clow v. Yount, 93 Ill. App. 112.

[3] Miller v. Garling, 12 How. Pr. 203; Blackwell v. Acton, 38 Ind. 425; Mitchell v. Burch, 36 Ind. 529; Davis Sewing Machine Co. v. Best, 50 Hun, 76, 4 N. Y. Supp. 510; Dutro v. Kennedy, 9 Mont. 101, 22 Pac. Rep. 763; Arzaga v. Villalba, 85 Cal. 191, 24 Pac. Rep. 656, overruling Kelly v. McKibben, 54 Cal. 192; Redington v. Numan, 60 id. 632; Laughlin v. Barnes, 76 Mo. App. 258, 266; Loeb v. Mann, 39 S. C. 465, 18 S. E. Rep. 1.

In Wilson v. Thomson, 4 Vict. L. R. (law) 281, the plaintiff proved that he was subjected to very considerable inconvenience, being prevented from obtaining a loan elsewhere, and put to some expense in endeavoring time after time to obtain an interview with the defendant. Though the property was returned, these grounds of damage were held tenable.

The opinion of a party that he has been damaged in a specified sum for trouble, expense and time consumed in the pursuit of property, no statement of particulars being given, is not sufficiently certain to justify the recovery of damages for such pursuit. Hays v. Windsor, 130 Cal. 230, 62 Pac. Rep. 395.

[4] Cook v. Clary, 48 Mo. App. 166.

Injury done to lumber cannot be recovered for under an allegation that the defendant has wrongfully retained the property to the damage of the plaintiff. Whitney v. Levon, 34 Neb. 443, 51 N. W. Rep. 972. See Rosecrans v. Asay, 49 Neb. 512, 68 N. W. Rep. 627; Armagost v. Rising, 54 Neb. 763, 75 N. W. Rep. 534.

the prosecution of his action,[1] nor for his attorney's fees therein.[2] The owner of a horse who pays entrance fees and fines pursuant to the rules of a trotting association in order that the horse may compete for purses in future races, such payments being made after the horse was taken on process, cannot recover the amount.[3] The loss of employment as the result of taking and detaining the tools of a mechanic is too remote to be the basis of a recovery;[4] and so is injury to credit where a mercantile stock is taken.[5] The rule concerning the recovery of prospective profits is the same in replevin as in actions upon contract, in the absence of any circumstances showing malice. They cannot be recovered for if the testimony shows that they could have been realized only under the most favorable circumstances.[6] The profits which the plaintiff might have made from the performance of particular threshing contracts if the defendant had not deprived him of the use of his threshing machine have been held to be too conjectural and uncertain to furnish a basis for recovery.[7]

In Wisconsin a complaint under the code, being in the statutory form (which does not allege damages), will let in proof of special damages for the detention, as the statute provides for their recovery. For that reason the rule that such damages must be alleged is to that extent inapplicable. In replevin for

[1] Taylor v. Morton, 61 Miss. 24; Jandt v. South, 2 Dak. 46, 69, 47 N. W. Rep. 779.

[2] Id.; Kepner v. Mix, 81 Mo. 93; Winstead v. Hulme, 32 Kan. 568, 4 Pac. Rep. 994; Cowden v. Lockridge, 60 Miss. 385; Smith v. Bryant, 1 Kan. App. 754, 41 Pac. Rep. 1069; Laughlin v. Barnes, 76 Mo. App. 258, 266; Hampton & B. R. & L. Co. v. Sizer, 35 N. Y. Misc. 391, 71 N. Y. Supp. 990; Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 Pac. Rep. 1094; Hays v. Windsor, 130 Cal. 230, 62 Pac. Rep. 395; Trimble v. Keer, Rountree Mercantile Co., 56 Mo. App. 683; Wright v. Broome, 67 id. 32; Cook v. Gross, 60 App. Div. 446, 69 N. Y. Supp. 924.

A section of the California code permitting the recovery of money expended in pursuit of converted property does not cover attorney's fees in an action of claim and delivery. Harris v. Smith, 132 Cal. 316, 64 Pac. Rep. 409.

[3] Riley v. Littlefield, 84 Mich. 22, 47 N. W. Rep. 576.

[4] Kelly v. Altemus, 34 Ark. 184, 36 Am. Rep. 6. See § 1117.

[5] Winstead v. Hulme, 32 Kan. 568, 4 Pac. Rep. 994; Smith v. Bryant, 1 Kan. App. 754, 41 Pac. Rep. 1069.

[6] Talcott v. Crippen, 52 Mich. 633, 18 N. W. Rep. 392; Aber v. Bratton, 60 Mich. 357, 27 N. W. Rep. 564.

[7] Williams v. Wood, 55 Minn. 323, 56 N. W. Rep. 1066, 61 Minn. 194, 63 N. W. Rep. 492, following Cushing v. Seymour, 30 Minn. 301, 15 N. W. Rep. 249.

a horse it was held the plaintiff might recover as damages, not only the value of its use during the time it was unjustly detained, but, if injured by defendant's neglect while so detained, the plaintiff's expenses in taking care of and doctoring it, in excess of what those expenses would have been but for the injury, and for the loss of the animal's services after the plaintiff had gained possession, as well as for the permanent depreciation of its value resulting from the injury.[1] In an English case the plaintiff in replevin, after obtaining judgment for the expenses incurred in giving the replevin bond, brought an action of trespass to recover for the breaking and entering of his shop and dwelling and removing fixtures and other property therefrom, whereby, it was alleged, he was prevented from carrying on his business, and was believed by his customers to be incapable of doing so, and was put to expense in and about replevying his goods. It was held that the judgment in replevin was a bar to the action of trespass so far as the personalty was concerned,[2] because that element of damage was recoverable in the replevin suit; but it was otherwise as to the trespass to the realty.[3] Bovill, C. J., said: "When the goods were not redelivered by the sheriff, according to the books, it would appear that the plaintiff could recover the full amount of the damages that he had sustained. . . . I see no reason in principle why there should be any limitation as to the amount of the damages recoverable in such a case. I do not know any ground in law for confining the damages to the amount of the expenses of the replevin bond. In practice, these expenses are all that are recovered, merely because there is generally no other damage. . . . Whatever damages have been actually sustained may be recovered." In a New York case replevin was brought for a machine, the invention of plaintiff, made as a model and for the purpose of experimenting with and exhibiting at fairs soon to be held. The defendant had entered into a contract for its purchase and took possession of it for the ostensible purpose of testing it, but in fact with the object of

[1] Zitske v. Goldberg, 38 Wis. 216; Wadleigh v. Buckingham, 80 id. 230, 49 N. W. Rep. 745.

[2] See Kapischki v. Koch, 79 Ill. App. 238, 180 Ill. 44, 54 N. E. Rep. 179.

[3] Gibbs v. Cruikshank, L. R. 8 C. P. 454; Graham v. O'Callaghan, 14 Ont. App. 477.

preventing its exhibition. The plaintiff was permitted to recover the expense incurred in a partially successful attempt to manufacture another machine for the purpose of showing it at the fairs and interest on such expense, notwithstanding the fact that the invention was practically worthless.[1] Damage sustained by the defendant in consequence of being wrongfully arrested for having concealed the property sued for cannot be recovered in the replevin suit.[2] Under a statute providing for the assessment of damages sustained by the unlawful taking and detention of property or by the unlawful detention of it, there may be a recovery of the expense of replacing a building wrongfully removed; such expense is not a part of the taxable costs.[3]

§ 1147. Recovery if property not returned. The plaintiff may still proceed with his action where he does not obtain the property and will be entitled to recover, in addition to damages, the property or its value,[4] or interest on the value in lieu of damages.[5] If he is entitled to recover the value the measure of damages is the same as in trover or trespass.[6] But the value and damages must be proved, otherwise the plaintiff will recover only a nominal sum.[7] This principle will not be strictly

[1] Scattergood v. Wood, 14 Hun, 269. The second machine was made at less expense than the original, and the court thought the damages were as favorable to the defendant as he had a right to ask.

[2] Hodges v. Nall, 66 Ark. 135, 49 S. W. Rep. 352.

[3] Byrnes v. Palmer, 113 Mich. 17, 71 N. W. Rep. 331.

[4] Harrisburg Electric Light Co. v. Goodman, 129 Pa. 206, 19 Atl. Rep. 844; Ryan v. Fitzgerald, 87 Cal. 345, 25 Pac. Rep. 546.

Where a mortgagee unlawfully seizes a mortgaged chattel and the mortgagor sues to recover its possession, if that cannot be delivered he is entitled to recover its value, and not merely the value of its use for the time intervening between the seizure and the maturity of the mortgage debt, for the reason that, until breach of condition, the property belongs absolutely to the mortgagor, subject only to a lien for the payment of the debt. Finley v. Cudd, 42 S. C. 121, 125, 20 S. E. Rep. 32.

[5] Hall v. Tillman, 110 N. C. 220, 14 S. E. Rep. 745.

[6] Bigelow v. Doolittle, 36 Wis. 115; Frazier v. Fredericks, 24 N. J. L. 162; Hanselman v. Kegel, 60 Mich. 540, 27 N. W. Rep. 678; Aultman v. Stichler, 21 Neb. 72, 31 N. W. Rep. 241; Romberg v. Hughes, 18 Neb. 579, 26 N. W. Rep. 351.

[7] Phenix v. Clark, 2 Mich. 327; Seabury v. Ross, 69 Ill. 533; Mann v. Grove, 4 Heisk. 403; Maguire v. Dutton, 54 N. J. L. 597, 25 Atl. Rep. 254.

Damages cannot be recovered for articles not named in the writ, though it be proven that they were taken or detained. Ott v. Specht, 8 Houst. 61, 12 Atl. Rep. 721.

adhered to if the property has no market value. Thus, where the owner of Sioux half-breed scrip is wrongfully deprived of the same he may recover its value to him although the scrip, being unassignable, is valueless in the hands of third persons, and notwithstanding duplicates might be obtained on proof of the loss of the originals. A wrong-doer, it was held, will not be permitted to resort to such a defense.[1] The plaintiff furnished defendant vouchers, a statement of expenditures and an affidavit for inspection. They had a peculiar value to him which might be affected by circumstances, and such value measured his recovery.[2] In several states the defendant has a right to retain the property by giving a counter-bond, either to pay for or deliver it if the plaintiff shall succeed in establishing a right to it. In Pennsylvania the defendant has an election to deliver the property on the writ when the sheriff calls for it or to retain it by giving security. If the property be delivered and the plaintiff sustains his action the defendant is [542] answerable in damages for the taking and detention up to the time of delivery. If the property be retained he is answerable in addition for its full value. In either case the action thenceforth proceeds for damages alone. The property itself can in no event be recovered at law from the defendant; nor can he tender it afterwards in discharge of the action or even in satisfaction *pro tanto* of the damages claimed.[3] The claim and delivery of the code as generally adopted allows the defendant to retain the property by executing the counter-bond. The judgment, if for the plaintiff, where this right to retain the property has been exercised, is in the alternative after the form of the judgment in detinue; it is for delivery of the property or for its value if delivery cannot be had, and for damages absolutely. The value is found, and usually of

In replevin for a building there cannot be a recovery for injury to personal property resulting from the removal of the building. Jameson v. Kent, 42 Neb. 412, 60 N. W. Rep. 879.

A verdict that the defendant is guilty and a judgment thereon, no mention being made of damages or costs, entitles the plaintiff to at least nominal damages and costs. Starkey v. Waite, 69 Vt. 193, 37 Atl. Rep. 292.

[1] Bradley v. Gamellé, 7 Minn. 331.

[2] Drake v. Auerbach, 37 Minn. 505, 35 N. W. Rep. 367. The defendant had the right to satisfy the judgment by surrendering the property and paying the costs.

[3] Fisher v. Whoollery, 25 Pa. 197; Schofield v. Ferrers, 46 id. 438; Collins v. Bellefonte Central R. Co., 171 Pa. 243, 33 Atl. Rep. 331; Swope v. Crawford, 16 Pa. Super. Ct. 474.

the date of the trial. But the statutes are not entirely uniform on these points, nor the decisions where the statutes are similar. Where the statute provides for judgment for delivery of the property or for its value if delivery cannot be had, the judgment must conform to the statute unless it appears that a return cannot be had.[1] But if the record shows the latter fact a simple judgment for the value of the property is good.[2]

§ 1148. Same subject. In Missouri if the plaintiff succeeds he has the choice of taking the property or its value; by the value is meant the value at the time of the verdict.[3] In New York this option does not exist; at the termination of the suit by judgment in his favor the plaintiff must take the property if the defendant has it and will permit him to take it.[4] The jury are required to assess its value and damages for the detention. The value is assessed of the date of the trial; and any intermediate deterioration or depreciation must be recovered for as damages.[5] The value at the time of the trial is the usual subject of the inquiry and the proper subject of proof. Such value is to be accepted as a substitute for the property itself if the sheriff cannot deliver possession, and it should

[1] Hanf v. Ford, 37 Ark. 544; Jetton v. Smead, 29 Ark. 372, 383.

[2] Boley v. Griswold, 20 Wall. 486; Burton v. Platter, 53 Fed. Rep. 901; Brown v. Johnson, 45 Cal. 77.

[3] Chapman v. Kerr, 80 Mo. 158; Mix v. Kepner, 81 id. 93; Pope v. Jenkins, 30 id. 528; Miller v. Bryden, 34 Mo. App. 602; Hinchey v. Koch, 42 id. 230; Kirkendall v. Hartsock, 58 Mo. App. 234.

If an agreement is made as to the value at the commencement of the action, it will be presumed, nothing appearing to the contrary, that there has not been any change in value. Merrill Chemical Co. v. Nickells, 66 Mo. App. 678.

Where the plaintiff claimed under a chattel mortgage and the sale took place within a reasonable time after the replevin suit was brought, and was fairly conducted, the price at which the property was sold fixed the value of it as between the parties. Hume Bank v. Hartsock, 56 Mo. App. 291.

If it is impracticable to assess the value of the property as of the time of the trial because it has been scattered by the wrong-doer the plaintiff may show its value when it was last accessible to him, and such value will, nothing appearing to the contrary, be presumed to be its value at a trial three or four years later. Jennings v. Sparkman, 48 Mo. App. 246. See Willison v. Smith, 60 id. 469.

[4] Dwight v. Enos, 9 N. Y. 470; Fitzhugh v. Wyman, id. 559; Brewster v. Silliman, 38 id. 423.

[5] Id.; Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641; Redmond v. American Manuf. Co., 121 N. Y. 415, 24 N. E. Rep. 924; National Cash Register Co. v. Agne, 43 App. Div. 605, 60 N. Y. Supp. 348.

be the equivalent thereof.[1] An action of claim and delivery may be brought against a wrong-doer although he has parted with the possession of the property before the commencement of the action. If the jury find that the acts of the defendant [543] in obtaining and sending away the property were fraudulent the plaintiff has a right to recover its value if possession cannot be delivered.[2] In Minnesota the alternative form of the judgment is required.[3] It is there held not to be necessary for the jury to assess the value of the several articles in question separately, unless requested by the plaintiff, with a view to obtaining a part of the property where all cannot be delivered on final process.[4] Where part has been replevied and a part not, only the value of the latter need be found;[5] and that is to be assessed at the time of the wrongful taking or detention. If the defendant recovers the value is fixed at the time the property is replevied from him.[6] If a levy is made upon growing crops by filing a certified copy of the execution, and a statute forbids their sale until they are ripe or fit to be harvested, their value is to be found as of the date of the sale made in pursuance of the statute.[7] In Tennessee where the sheriff returns that he cannot get possession of property described in the writ and has made known the contents of the writ to the defendant, the plaintiff may elect to declare in trover or detinue and proceed as in the form of action selected.[8] In Nevada the judgment for the plaintiff in claim and delivery, where the property has remained in the possession of the defendant, is for the property or its value if delivery cannot be had. The defendant has a right to deliver it instead of paying the value.[9] The value is there fixed at the time of trial.[10] The rule is the same in Kansas[11] and Nebraska.[12]

[1] Brewster v. Silliman, 38 N. Y. 423.

[2] Ellis v. Lersner, 48 Barb. 539.

[3] Berthold v. Fox, 13 Minn. 51.

[4] Caldwell v. Bruggerman, 4 Minn. 270.

[5] Hecklin v. Ess, 16 Minn. 51.

[6] Sherman v. Clark, 24 Minn. 37.

[7] Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63.

[8] Act of 1816, ch. 65; Nashville Ins. & T. Co. v. Alexander, 10 Humph. 378.

[9] Lambert v. McFarland, 2 Nev. 58; Carson v. Applegarth, 6 id. 187; Buckley v. Buckley, 12 id. 423.

[10] O'Meara v. North American Mining Co., 2 Nev. 112; Bercich v. Marye, 9 id. 312; Gardner v. Brown, 22 Nev. 156, 168, 37 Pac. Rep. 240.

[11] Russell v. Smith, 14 Kan. 366; Chase County Nat. Bank v. Thompson, 54 Kan. 307, 38 Pac. Rep. 274.

[12] Deck v. Smith, 12 Neb. 839, 10 N. W. Rep. 705.

The Oklahoma statute is similar to that of Kansas.[1] In Wisconsin and Iowa the value is fixed as of the time of the taking.[2] In North Carolina the value of the property is determined as of the time of the taking, at least where it has been sold *pendente lite* by order of the court.[3] And such is the rule in New Jersey regardless of whether such a sale has been made.[4] In Iowa the successful plaintiff may elect to take a money judgment, in which case he can recover the value of the use of the property while it was detained and not merely interest on its value.[5]

§ 1149. Damages affected by the object of the action. In this contrariety of practice it is important to observe, with reference to the subject of damages, the distinction between those cases in which the actual pursuit of the property in specie ceases upon the return of the writ showing that it has not been obtained, either because it has been eloined or retained by execution of a counter-bond and those cases in which the plaintiff continues the pursuit until final judgment. At common law if the plaintiff declares in the *detinuit* he can recover damages for the detention only until replevin, though he should prove the property still in the defendant's pos- [544] session.[6] Such declaration implies that the property has been taken and delivered to the plaintiff and that the detention does not continue. The declaration depends on the return of the sheriff. If that shows that he has replevied the property and delivered it to the plaintiff his declaration is necessarily in the *detinuit*, for he has got the property and complains only of the taking and detention until replevied. If, however, the return shows that the property has not been delivered to the plaintiff the declaration is in the *detinet* and goes for damages, including the value of the property.[7] Then the action is like tres-

[1] Jackson v. Glaze, 3 Okl. 143, 41 Pac. Rep. 79.

[2] Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. Rep. 436; Aultman Co. v. McDonough, 110 Wis. 263, 85 N. W. Rep. 980; Neeb v. McMillan, 98 Iowa, 718, 68 N. W. Rep. 438.

[3] Hall v. Tillman, 110 N. C. 220, 14 S. E. Rep. 745.

[4] Maguire v. Dutton, 54 N. J. L. 597, 25 Atl. Rep. 254.

[5] Hartley State Bank v. McCorkell, 91 Iowa, 660, 60 N. W. Rep. 197; Cook v. Hamilton, 67 Iowa, 394, 25 N. W. Rep. 676.

[6] Truitt v. Revill, 4 Harr. 71.

[7] Id.; Kehoe v. Rounds, 69 Ill. 351; Karr v. Barstow, 24 Ill. 580; Frazier v. Fredericks, 24 N. J. L. 162; Bruen v. Ogden, 11 id. 370; Field v. Post, 38 id. 346.

pass or trover: solely for damages; it is in effect trespass when the plaintiff was deprived of the property by a tortious taking· trover, if the wrong consists in an unlawful detention merely The measure of damages is the same as in those actions upon a similar state of facts. The same proof is admissible for compensatory and exemplary damages. The defendant is charged, by the rule generally recognized, with the value at the time of the taking or conversion and interest from that time to the trial.[1]

§ 1150. Recovery for use and increase in value. There is no principle upon which the defendant can be charged with the use of the property, though valuable, after the date at which he is charged with its value; that would involve the inconsistency of allowing the plaintiff compensation for such use after he will have ceased to be the owner of the property on the satisfaction of the judgment. The same consideration is adverse to allowing him any benefit from any subsequent appreciation in market value or by the defendant's labor.[2] But other principles are invoked to sustain such recoveries. One is that the defendant should not be permitted to make a profit out of his own wrong. This principle is sound; but it is often loosely applied. If the wrong-doer is sued for the value of property which he has taken and converted it is in anticipation that the judgment will be collected or paid. When it is satisfied this principle does not derogate from the defendant's [545] title to the property, nor from the beneficial incidents of his ownership. The owner is to have just compensation for the injury; this has been held to entitle him to any advance in price from general causes which he would immediately have realized, or which the defendant has or might have obtained. When any departure is properly allowed from the price at the time of the taking or conversion it is justified only on the ground of giving full and adequate compensation. When that is paid the property belongs to the defendant, and by relation

[1] Id.; Fisher v. Whoollery, 25 Pa. 197; Schofield v. Ferrers, 46 Pa. 438; Heard v. James, 49 Miss. 236; Hanselman v. Kegel, 60 Mich. 540, 27 N. W. Rep. 678; Just v. Porter, 64 Mich. 565, 31 N. W. Rep. 444; Romberg v. Hughes, 18 Neb. 579, 26 N. W. Rep. 351.

[2] See Sommer v. Adler, 36 App. Div. 107, 55 N. Y. Supp. 483, as to the right to recover enhanced value under the New York code.

from the time he was charged with and convicted of taking and converting it. Whatever use, otherwise, he can make of the property and whatever advantages he can derive from it belong to him without any prejudice from the circumstance that his title had a tortious inception. The plaintiff is entitled to the value at the time of the wrongful appropriation and to interest from that date at least; and therefore is not affected by any depreciation afterwards. If the property perishes or is in any manner injured after the time when the defendant's title by relation attaches it is his loss, a loss incident to ownership.

Where the judgment in replevin is required, in case the property has not been replevied and delivered to the plaintiff, to be in the alternative, for its delivery or for its value if delivery cannot be had, there is a strong implication that the value shall be assessed at the time when delivery is adjudged in favor of the prevailing party. The value is the substitute for the delivery, and where the property is still within the defendant's control it has been deemed proper in detinue, from which this feature of the code remedy of claim and delivery is derived, to magnify the estimate of value to insure its actual delivery.[1] So it has been held proper to reduce it under particular circumstances, on the principle of limiting the compensation to the actual injury.[2] It is, however, consonant to legal analogies to fix the value at the time when delivery is required to be made rather than at another time.[3] But that is not the time to which the whole injury is referred; on the contrary, [546] it is then merely adjusted and the due recompense ascertained. The wrong is done when the taking or conversion occurs; that wrong is a continuing one while property belonging to the plaintiff is tortiously withheld from him. By the remedy for the recovery of specific property by which he is entitled and obliged to resort to final process for its delivery to him, he continues to assert a right to it until he voluntarily receives the value for it. The law aims to compensate the entire injury. It is usually satisfied if the plaintiff succeeds in obtaining the

[1] Goodman v. Floyd, 2 Humph. 59; Mayberry v. Cliffe, 7 Cold. 120; Cochrane v. Winburne, 13 Tex. 143; Hoeser v. Kraeka, 29 id. 450.

[2] Single v. Schneider, 24 Wis. 299; Buckley v. Buckley, 12 Nev. 423.

[3] Swift v. Barnes, 16 Pick. 194.

property in as good condition, not depreciated, but worth as much as when taken, and he receives interest on its value, unless he has been put to greater expense and inconvenience from being deprived of its use than the interest will compensate; then, in lieu of interest, he may recover the value of the use; and where this is allowed there ought not to be any compensation for the wear and depreciation naturally consequent upon such use.[1] If the defendant by his wrongful conduct has deteriorated the property or a loss on its value has proximately and with certainty resulted from the wrongful detention, that should be recovered for in addition to the value in order to give the owner full indemnity. He is entitled to any advance in market value, for it is an appreciation of his own property. But in some cases where the alternative judgment is rendered the value is fixed at the inception of the wrong.[2] This may be done without materially changing the result by keeping in view that the time of trial is the day of final reckoning for surrender of the title if the property itself cannot be had. In making up the account the owner is credited with the value at the time of the defendant's wrongful appropriation; this cannot be diminished by any injury to or depreciation of the property after that date, for which the defendant is the responsible cause, and whether any could occur for which he is not responsible will be considered presently. But if it subsequently appreciates so that it is worth more at the trial the owner must consider himself thereby injured, and add to the value noted at the date of the conversion the amount of such [547] appreciation; so if the use of the property is worth more than the interest he may elect to consider himself more injured by loss of the use than the interest will compensate and claim the former. In this way, though the computation is very illogical, the same practical result may be reached.

Where it was sought to recover the difference between the highest price that corn reached during its detention and its market value on the day the levy was released the court said: If on the day the levy was made the plaintiff had a contract with some responsible party to buy this corn at the highest price it should attain during the period of detention, and if he

[1] Odell v. Hole, 25 Ill. 204. [2] Sherman v. Clark, 24 Minn. 37.

was prevented by the levy from performing his part of this contract, and the market value of corn rose during the detention above the price on the day of the release, there would be some show of reason in the claim. But because the claim rested on the simple facts that the market price of corn was higher during the detention than it was when the levy was released, that the plaintiff might have sold it if there had been no levy upon it, and that the sheriff held it under a levy, it was not sustained. It was competent for the defendant to show that within thirty days after the corn was returned to the plaintiff, while he held it, and before the action was commenced, its market value was as high and its sale as feasible as during the time it was detained.[1]

§ **1151. Intermediate injury and depreciation.** The property may suffer injury or depreciation in the hands of the defendant intermediate the taking or wrongful detention and the bringing of replevin when it is taken and delivered to the plaintiff; and in other cases it may suffer it during the pendency of the action when the defendant retains the property and the plaintiff, on recovery, is obliged to take an alternative judgment. The question whether the plaintiff, if he maintains his suit, must bear this loss is the same in each of these cases. It is a loss relative to the property while it belongs to him by his original title and by the effect of the adjudication. The defendant should be charged with this loss if he is the occasion of it; be responsible for it if it is the natural and proximate consequence of the wrongful taking or detention; or if in like manner it resulted from any subsequent act or negligence on his part during such detention. Such a ground of liability existed in some of the cases which are sometimes cited to support a broader responsibility. A stock of merchandise is likely to suffer deterioration by seizure, removal and detention,[2] and so of household goods;[3] and also by the

[1] Hoyt v. Fuller, 104 Fed. Rep. 192, 43 C. C. A. 466.

[2] Rowley v. Gibbs, 14 Johns. 385; Beveridge v. Welch, 7 Wis. 465; Riley v. Littlefield, 84 Mich. 22, 47 N. W. Rep. 576; Anderson v. Sloane, 72 Wis. 566, 40 N. W. Rep. 214, 7 Am. St. 885; Klinkert v. Fulton Storage & M. Co., 113 Wis. 493, 89 N. W. Rep. 507; Chapman v. Kerr, 80 Mo. 158; Miller v. Bryden, 34 Mo. App. 602.

Where a stock of drugs was re-

[3] Baldridge v. Dawson, 39 Mo. App. 529.

lapse of time.[1] A loss may also result in such case from keeping the stock from market through the proper season for sale.[2] As the defendant, in the cases supposed, retains the property upon an honest claim of ownership he should preserve, manage and dispose of it as men having such property ordinarily do to make it most beneficial to them. On this principle, if it has a usable value he is charged with it;[3] so if it is kept as a commodity for sale he may be presumed to judiciously dispose of it at a seasonable time.[4] If the property has been mingled with the property of the defendant in such a way as to make it difficult to ascertain what part of it came to his hands from the plaintiff, the latter may supply any deficiency from the property with which his is intermingled.[5]

There are cases which hold and some *dicta* in the books favoring the doctrine that the wrong-doer must make good all injury to the property and all deterioration which it suffers while he [548] detains it, whether such damage accrues through his fault or not. The owner can hold him responsible for such loss by suing in trespass or trover; for by that form of action the plaintiff gives effect to the wrongful taking or conversion to clothe the wrong-doer with the title from the date of his interference with the property; the wrong-doer is charged with the property at the time he takes or detains it; and the effect of recovery in such actions, followed by satisfaction, is to make him the owner from that time. Hence the subsequent loss, though wholly by accident, falls upon him as the owner. It is optional with the injured party to acquiesce in such taking

plevied from an officer it was ruled that in estimating the damages during the week plaintiff was deprived of possession the evidence was not confined to the net income of the business at or about the time of the levy; the elements of damage were the closing of the store and handling the goods in making an inventory. Schars v. Barnd, 27 Neb. 94, 42 N. W. Rep. 906.

[1] Young v. Willet, 8 Bosw. 486; Russell v. Smith, 14 Kan. 366.

[2] Carson v. Golden, 36 Kan. 705, 14 Pac. Rep. 166; Morisette v. Howard, 62 Kan. 463, 468, 63 Pac. Rep. 756.

[3] Crossley v. Hojer, 11 N. Y. Misc. 57, 31 N. Y. Supp. 837.

[4] Gordon v. Jenney, 16 Mass. 465.

In an action to recover notes deposited as collateral the damages may include the amount received on them and any depreciation in their value arising from the defendant's failure to present them to the assignee of their maker. Sullivan v. Sullivan, 20 S. C. 509.

[5] Starke v. Paine, 85 Wis. 633, 639, 55 N. W. Rep. 185; Swafford Bros. Dry Goods Co. v. Jacobs, 66 Mo. App. 362.

or detention to make it a disposition of his property; by bringing trespass or trover he does so, even though he takes it back; for when it is returned in such cases it does not affect the cause of action, but only goes in mitigation of damages. But by bringing replevin he expresses his determination not to acquiesce; his purpose then is to recover his property, and there is no interruption of his ownership; he continues his pursuit of it in specie till judgment. Every question affecting his indemnity, therefore, is to be decided on the theory and assumption of his continued and uninterrupted title to it. If it has suffered injury or deterioration he must bear the loss as an incident of ownership, unless he can make a case for charging it upon some other person. He must be able to show that such loss naturally and proximately resulted from the defendant's act, or he cannot hold him liable for it, unless, indeed, there is some consideration of policy that imposes the loss on the defendant on some other terms.

In an early Kentucky case[1] the court held in such an action for a slave that, though the defendant acquired the possession rightfully, yet if he continued the detention after suit brought to recover it, the possession became wrongful; that he who wrongfully detains the property of another does it at his own peril, and will be responsible to the proprietor, though it be destroyed by accident or taken from him by violence. And that doctrine seems to have become the settled law of that state[2] as well as of Alabama.[3] A case in the latter state [549] was commenced in 1861 for the recovery of certain slaves. The action was of the nature of detinue, and therefore did not disturb the defendant's possession during its progress. It was tried in 1866, and the plaintiff succeeded in establishing his title. The judgment was for the delivery of the property or the payment of the alternate value, assessed at $20,000, although, pending the suit, general emancipation had taken effect, of which the court had, of course, judicial notice. This change in the *status* of the subject was treated, not as a determination of the plaintiff's title to the several negroes named

[1] Carrel v. Early, 4 Bibb, 270.

[2] Caldwell v. Fenwick, 2 Dana, 333; Gentry v. Burnett, 6 T. B. Mon. 115; Scott v. Hughes, 9 B. Mon. 104.

[3] White v. Ross, 5 Stew. & P. 123; Rose v. Pearson, 41 Ala. 692; Fragin v. Pearson, 42 id. 335.

in the declaration, but as a death or destruction of the property; and because it occurred while the defendant had a wrongful possession he was liable for the value; and the value, not when the delivery was ordered, but at any time between the commencement of the suit and its termination.[1] Walker, C. J., said: "When an owner's property has been converted there immediately springs up in his favor a right to have its value, and that right may be enforced in an action of trover, without the peril of defeat by the death or destruction of the property. If in detinue a recovery of the property or its alternate value is prevented by its death or destruction, it is obvious that that form of action is inadequate to redress the wrong or enforce the right in its full extent. The plaintiff must yield his desire to obtain the specific property, or he must incur the peril of losing it in the possession of the tort-feasor. The policy of this court has been so to shape its adjudications in reference to the action of detinue as to encourage the delivery of property wrongfully withheld. This policy, which seems to us to be wise, would not be consulted by placing the subject of litigation at the hazard of the owner and relieving the wrong-doer from responsibility. Indeed, the contrary policy, when the property is of a perishable nature, would enable the defendant, by retaining possession and prolonging the litigation, to defeat the plaintiff's right to enjoy his own property." The plaintiff was a mortgagee, and it was plausibly said that [550] if he had obtained the possession he might have sold the property and realized its full value. And the learned judge further remarked: "It is unjust and unconscientious under such circumstances that the loss, if it had resulted from death, should fall upon the plaintiff."

§ 1152. Same subject. In Suydam v. Jenkins,[2] which is noted for furnishing the opportunity improved by a learned jurist to write one of the best judicial opinions on the law of compensation to be found in the English language, Duer, J., expressed himself strongly in favor of the same doctrine. He said: "We cannot think that a wrong-doer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner. We have seen

[1] Rose v. Pearson, 41 Ala. 690. See Johnson v. Marshall, 34 id. 522.

[2] 3 Sandf. 614.

that the defendant in trover or trespass is in all cases responsible for the value of the property when taken or converted, and certainly it has never been supposed that he can discharge himself from this responsibility, in whole or in part, by showing that the property had been destroyed or injured by an inevitable accident after he had obtained its possession. A plaintiff who, without right or title, has seized the property of another by a writ of replevin is as much a wrong-doer as a defendant in trover. No reason can be given why his liability should be less extensive; and in fact, when the replevin suit is terminated, although he cannot be treated as a trespasser, he may be sued in trover at the election of the defendant.[1] The decision in Carpenter v. Stevens[2] is plainly inconsistent with the prior decision of the same court in Rowley v. Gibbs,[3] in which the defendants in a replevin, in addition to a return of the goods, were held to be entitled to damages for deterioration in their value from the time of the replevy, although it was not pretended that the decrease in value was attributable in any degree to the act or default of the plaintiff, and it is irreconcilable with numerous cases in which it has been held, expressly or by implication, that, in a suit upon a replevin bond, the value of the property as fixed by the penalty of the bond is, at the election of the plaintiff, the measure of damages."[4] The question is the same, and is here treated as identical, where the plaintiff has ob- [551] tained the property by his writ of replevin and the defendant succeeds in his defense and is entitled to a return or the value at his election. The taking of an appeal by the defendant in replevin does not constitute a new and independent detention of the plaintiff's property where it has been delivered to the defendant by the officer in accordance with law; hence depreciation in value after the rendition of a judgment and pending an appeal therefrom cannot be recovered for.[5]

[1] Yates v. Fassett, 5 Denio, 21.

[2] 12 Wend. 589.

[3] 14 Johns. 385.

[4] Citing Middleton v. Bryan, 3 M. & S. 158; Mattoon v. Pearce, 12 Mass. 406; Huggeford v. Ford, 11 Pick. 223; Wood v. Braynard, 9 id. 322; Barnes v. Bartlett, 15 id. 71; Brizsee v. Maybee, 21 Wend. 144; McCabe v. Morehead, 1 W. & S. 513. To these may be added, as supporting the same view, Young v. Willett, 8 Bosw. 486; Mayberry v. Cliffe, 7 Cold. 117.

[5] Commerce Exchange Nat. Bank v. Blye, 123 N. Y. 132, 25 N. E. Rep. 208; Bracken v. Atlantic Trust Co., 167 N. Y. 510, 60 N. E. Rep. 772.

In Massachusetts the replevin bond was formerly by statute expressly conditioned for return of the goods in like good order and condition as when taken; and when that special requirement was dropped by revision no change was deemed to have been contemplated.[1] Therefore, the defendant was entitled at least to have the property or what it was worth when taken; but being entitled to the property itself, its value when demanded on the writ of restitution could be recovered.[2] This is the rule in Iowa[3] and in Illinois.[4] In Wisconsin it is said that the true rule, where the plaintiff recovers either possession or value fixed as of a date later than the tortious taking, is that he shall recover in addition, as damages, any depreciation in the value of the property which has taken place pending the detention from any cause.[5] "That rule is eminently just, in that it relieves the innocent owner from the risks of depreciation or destruction, against which he is prevented from guarding by the wrongful detention by another, and requires such risks to be borne by him who illegally withholds the property. The peril should rest upon the guilty, rather than the innocent."[6] In a case, ruled in the exchequer chamber in 1847, in detinue for railway scrip which had been delivered to the plaintiff, after action brought, under a judicial order, it was determined that, in estimating the damages, it was proper for the jury to consider (as they were directed by the judge to do) the difference in value of the scrip at the time of the demand and at the time of its delivery pursuant to such order. It was also determined that, inasmuch as the scrip had been redelivered, the verdict and judgment were properly confined to an assessment of damages for the detention — by analogy to the case of the redelivery of charters being rendered impossible by reason of their having been burnt, in which event the value of the land was recovered in damages.[7]

[1] See Parker v. Simonds, 8 Met. 205.

[2] Swift v. Barnes, 16 Pick. 194.

[3] Hinkson v. Morrison, 47 Iowa, 167; Lillie v. McMillan, 52 id. 463, 3 N. W. Rep. 601.

[4] Suppiger v. Gruaz, 137 Ill. 216, 27 N. E. Rep. 22; Clow v. Yount, 93 Ill. App. 112.

[5] Citing Ingram v. Rankin, 47 Wis. 415, 2 N. W. Rep. 755, 32 Am. Rep. 762; Wadleigh v. Buckingham, 80 Wis. 230, 239, 49 N. W. Rep. 745; Carrel v. Early, 4 Bibb, 270; Cobbey on Replevin, § 867.

[6] Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 379, 80 N. W. Rep. 436.

[7] Williams v. Archer, 5 C. B. 318.

In Maine the bond requires the property to be returned in like good order and condition as when taken.[1] But there the plaintiff in replevin was held not liable for a horse which died without his fault while he held it pending the suit, on judgment being recovered by the defendant for a return. This was held in an action on the replevin bond. Such a loss of property had been previously held available to exonerate a receiptor[2] and also an officer having the property in custody on *mesne* process;[3] and the same principle was deemed applicable to a plaintiff in replevin because his possession was a lawful one. The court say, by Kent, J.: "The distinction in fact is that in the case at bar the replevin suit was instituted on the day the animal was seized on execution by the officer for the purpose of selling it to satisfy the same. It is urged that this distinction is vital on the ground that if the replevin suit had not been interposed the animal would have been sold in four days and the proceeds thus secured to the creditors, whereas, in the cases cited, the animal was attached on *mesne* process and held only as security to await final judgment, the animal dying before such judgment." After adverting to the grounds on which those cases were decided, and also Carpenter v. Stevens,[4] he continued: "The result from these author- [552] ities seems to be that the writ of replevin is one authorized by law to enable a party who in good faith asserts a claim of title or right of possession in a chattel to have his claim investigated and determined judicially." The property is treated as, in a certain sense, in the custody of the law. "The party who replevies, having given the bond required by the statute, is not a wrong-doer if he acts fairly, although the result may show that he was mistaken in his belief of his right of property."[5] Why should not the same reasoning apply in favor of a defendant who got possession and retains it in good faith and in a manner which would be justified if "his belief of his right of property" had been well founded, though the result of the suit may show that he was mistaken? No rule can be adopted in such a case for the purpose of deterring one who believes himself to be the owner from exercising an owner's domin-

[1] Berry v. Hoeffner, 56 Me. 170.
[2] Shaw v. Laughton, 20 Me. 266.
[3] Melvin v. Winslow, 10 Me. 397.
[4] 12 Wend. 589.
[5] Walker v. Osgood, 53 Me. 422.

ion and right of possession. He is technically a wrong-doer if he fails to maintain his title; and he is such if he gets possession by a writ of replevin without having a right and title which will sustain it. Where there is an honest dispute about the ownership of specific property, and the parties determine to contest to obtain and retain it in specie rather than for its value, one or the other must hold while the controversy is being settled; and if in such a case it perishes without the custodian's fault it seems more just to regard the loss as one which must be borne by him who is really the owner. The subject of the controversy ceases to exist; and as it has gone out of existence without either's fault why, from that point, should not the controversy cease and be confined to the adjustment of compensation to the owner for any damage which occurred before that time?

§ **1153. Same subject.** It has been held in Missouri that if slaves are sued for and die in the hands of the defendant during the pendency of the suit the plaintiff has no just claim for more than damages for the detention up to the time of the death; that if the depreciation or death be produced by the defendant's ill-treatment or neglect or if the slaves be sold to [553] another the rule might be otherwise.[1] Napton, J., said: "In relation to the death of three of the slaves sued for, which occurred after the institution of the suit and was suggested by a supplemental answer, the question presented is not free from difficulty and doubt, and, it must be confessed, has been very differently viewed by different courts. Our opinion, however, will be based principally upon our statute, which regulates the action brought in this case, and upon what we believe to be principles of sound public policy and natural equity. . . Before the adoption of our present code of practice, which abolishes the forms and names of actions as known to the common law, there was a distinction between detinue and trover, although in many cases it was at the option of the plaintiff to bring whichever he preferred. In trover the plaintiff admitted the title to the property sued for to be in the defendant, and only asked damages for the conversion which he asserted was wrongful. In detinue the

[1] Pope v. Jenkins, 30 Mo. 528; Jennings v. Sparkman, 48 Mo. App. 246.

plaintiff claimed to be the owner still, and demanded the specific property detained. As an act of God does an injury to no one, though it may occasion a loss, the loss of course falls upon the owner, and, therefore, where detinue was brought and an accidental loss occurred by the death of the property sued for it must fall upon the plaintiff if determined to be the owner. But it was otherwise in trover where the plaintiff admitted the change of title and only claimed damages for its conversion; there the loss would be the defendant's upon the same principle that it would be the plaintiff's in detinue."[1] A plaintiff in replevin, retaining the articles replevied until judgment in the suit, cannot claim damages for any depreciation in their value during that period because he may sell them immediately in such manner as will ascertain their value, for which alone he is answerable on his bond.[2]

§ 1154. Increase in value by defendant. If a wrong-doer has taken or converted the property without wilful fault and by labor or money has improved it and thus added to its value, if its identity has not been destroyed, the right [554] of the owner to retake it, subject to some fixed, and some vague and unsettled, limitations is universally admitted. Extreme cases can be mentioned where the exercise of the right would be very unjust, where a retaking would give the owner more than he ought to have and impose an undeserved loss on the wrong-doer. This injustice, when it occurs, results from necessity; for the owner cannot be divested of his property without his consent or fault, and no wrong-doer can divest him by any unauthorized act done to it which does not destroy its legal identity. While the owner's right subsists he cannot take his own without taking also the labor which has been bestowed upon it; therefore, the wrong-doer, however innocent of intentional wrong, is unfortunate in having inseparably annexed his work to another's property so that the latter must take it when he asserts his right to enjoy his own. The loss to the wrong-doer does not result from any principle or

[1] Bethea v. McLennon, 1 Ired. 530; Austin v. Jones, Gilmer, 341, per Coalter, J.; Buckley v. Buckley, 12 Nev. 423; Frey v. Drahos, 7 Neb. 194; Parker v. Simonds, 8 Met. 205; Bobo v. Patton, 6 Heisk. 172, 19 Am. Rep. 593. See Mosely v. Baker, 2 Sneed, 362; Boylston Ins. Co. v. Davis, 70 N. C. 485.

[2] Gordon v. Jenney, 16 Mass. 465.

rule of damages, but from the exercise of an undoubted right of property. We have seen that where trover is brought for a conversion, which has been succeeded by such improvement of the property, the plaintiff is ordinarily confined in his recovery to the value of the property in the place or condition in which the defendant converted it.[1] The damages are measured against such a wrong-doer on the principle of compensation; they do not include the value added by his labor when he has improved the property under a mistaken belief that he owned it. The same rule has been applied in replevin where the defendant has retained the property — logs made from timber by him — and the value assessed as a part of the damages.[2] Agnew, J., said: "It is in the power of the defendant in replevin to relinquish that proportion of its value which his labor or money has added to it by suffering the sheriff to return it to the owner. But this result depends on himself. If he claim the additional value it is always his right to retain the property by giving a property bond, and the effect of a [555] verdict for damages in favor of the plaintiff is to transfer the title to the defendant. If, therefore, he denies that his trespass was wilful and wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has it in his power to bring the damages of the plaintiff to their true standard. In a case of inadvertent trespass or one done under a *bona fide*, but mistaken, belief of right, this would generally be the value of the logs at the boom (the place of replevy), less the cost of cutting, handling and driving to the boom. Such a standard of damages, growing out of the nature of the act and of the form of action, is reasonable and does justice to both parties. It saves the otherwise innocent defendant his labor and money and gives the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities or other adventitious causes." The same ruling has been made in Wisconsin, though

[1] See §§ 1126–1128.

[2] Herdic v. Young, 55 Pa. 176, 93 Am. Dec. 739; Peters' Box & Lumber Co. v. Lesh, 119 Ind. 98, 12 Am. St. 367, 20 N. E. Rep. 291 (innocent purchaser).

the judgment is there for delivery of the property if delivery can be had; otherwise for its value.[1]

In Mississippi if timber is unlawfully cut and converted into staves which are mingled with others owned by the defendant so that the plaintiff is unable to identify his property, he may maintain replevin for part of the common lot equal to that which was made from his timber. If the defendant retains the property by giving a bond and it appears that he wilfully cut the timber or did not take reasonable precautions to ascertain its ownership, the value of the property in the form it was in at the time and place of seizure measures the recovery.[2] If the cutting was done in good faith under the belief that the title was in the trespasser he may show the cost of getting out and floating the timber to the place where it was seized.[3] In Michigan, where the writ of replevin is peremptory for delivery of the property to the plaintiff on his executing the requisite bond, it has been held that where the property had been taken by the wrong-doer in good faith and immensely improved by converting it into a new species of property, as timber into hoops, replevin would not lie; that the defendant's labor had added such value to the original material that the latter was a mere incident, and to prevent the injustice of allowing the owner in such a case to retake it by judicial process, and thus obtain so much more than compensation and subject the defendant to a loss so disproportioned to the injury he had done, it should be deemed that the identity of the property was lost.[4] In Arkansas a plaintiff in replevin for standing timber cut by an innocent trespasser and converted into cross-ties, is entitled to judgment for the delivery of the timber in the form of ties, though its value has been increased six-fold; but if delivery cannot be had he can recover the value of the ties, less the labor expended on them, if such expense does not exceed the increase in value.[5]

[1] Single v. Schneider, 24 Wis. 299, 30 Wis. 570. See Brewster v. Silliman, 38 N. Y. 423.

[2] Peterson v. Polk, 67 Miss. 163, 6 So. Rep. 615.

[3] Acre v. Bufford, — Miss. —, 31 So. Rep. 899.

[4] Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653. Compare Isle Royale Mining Co. v. Hertin, 37 Mich. 332.

[5] Eaton v. Langley, 65 Ark. 448, 47 S. W. Rep. 123, 42 L. R. A. 474, citing, to the last proposition, Herdic v. Young, Single v. Schneider, Isle Royale Mining Co. v. Hertin, Peters' Box & Lumber Co. v. Lesh, *supra;*

Section 2.

DEFENDANT'S CASE.

[556] **§ 1155. Successful defendant's rights.** Damages in favor of a defendant from whom property has been taken by a writ of replevin were not allowed at common law, but merely a judgment for its return.[1] But this deficiency has been remedied to some extent in England and fully in this country, generally by statute. Defendants are not only allowed a return of the property, but are permitted to recover in the replevin suit its value under some conditions in lieu of the thing itself, and damages for the detention.[2] The latter may be recovered whether the property is returned or not;[3] but are not

Heard v. James, 49 Miss. 236. It is observed in the opinion that the extent of the limitation of an innocent trespasser's liability is a question upon which the authorities are not agreed. But we think that, inasmuch as this is an exception to the general rule, made for the purpose of protecting the unintentional trespasser, it should be allowed to prevail only to the extent it is necessary to give protection, and that the owner, in actions for the possession of personal property in the new form into which it has been converted inadvertently, under a *bona fide* but mistaken belief of right, in case a delivery cannot be had, is entitled to recover the value of the property in its new form, less the labor and material expended in transforming it, provided the expenditures do not exceed the increase in value which was added to the transformation, in which event he should recover the value of the property in its new form, less the increase. Weymouth v. Chicago & N. R. Co., 17 Wis. 550. Some courts hold that the owner, in such cases, should recover the value of his property in its new form, less the expense incurred in converting it into such form and increasing its value. Goller v. Fett, 30 Cal. 482; Maye v. Tappan, 23 Cal. 306; Herdic v. Young, 55 Pa. 176, 93 Am. Dec. 739. But we do not think this is a correct rule in all cases, for the expense may exceed the increase in value, and in that event the rule would require the owner to pay for something that he never received.

[1] White v. Lloyd, 3 Blackf. 390; Parnell v. Hampton, 10 Ired. 463; Hopewell v. Price, 2 Har. & G. 275.

[2] See Whitwell v. Wells, 24 Pick. 25; Brown v. Stanford, 22 Ark. 76; Pierce v. Van Dyke, 6 Hill, 613; Ditmars v. Sackett, 81 Hun, 317, 30 N. Y. Supp. 721.

As to the right to recover under sec. 667, California code of civil procedure, and sec. 3336 of the civil code, where the property was not delivered to the plaintiff, see Black v. Hilliker, 130 Cal. 190, 62 Pac. Rep. 481.

In School District v. Shoemaker, 5 Neb. 36, it was held under the code in an action of replevin, if the jury find in favor of the defendant they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense, or a demand for damages.

[3] Schrandt v. Young, 62 Neb. 254.

recoverable if the defendant elects to regard the property as converted at the time it was taken and to take a money judgment for it.[1] In that case his right is measured by the value of the property when it was taken and interest to judgment; he cannot recover expenses incurred in preparing to defend the case after the taking.[2] The defendant will be entitled [557] to a return on any termination of the plaintiff's case for irregularity before pleading; and afterwards, where he succeeds upon such an issue as gives him a right to a return.[3] A separate action cannot be maintained to recover damages if the defendant has refused to have them assessed in the action in which judgment for return was rendered.[4]

§ 1156. A plaintiff obtaining possession and failing in his suit a wrong-doer.[5] Dispossessing a defendant of [558] personal property by means of a writ of replevin is in legal contemplation a wrong where the plaintiff does not prosecute his writ and suit to effect, and subjects the plaintiff to damages for the taking and detention on the same principles that govern the recovery of damages in favor of a prevailing plaintiff against a defendant. But the redress which a defendant can obtain in the replevin suit beyond a return of the property on a discontinuance, nonsuit or trial depends upon local stat-

262, 86 N. W. Rep. 1085, modifying Romberg v. Hughes, 18 Neb. 579, 26 N. W. Rep. 351; Buckley v. Buckley, 12 Nev. 423; Haskins v. Everett, 4 Sneed, 531; Mayberry v. Cliffe, 7 Cold. 117; Nichols & Shepard Co. v. Paulson, 10 N. D. 440, 87 N. W. Rep. 977.

[1] Powers v. Benson, — Iowa, —, 94 N. W. Rep. 929.

[2] Becker v. Staub, 114 Iowa, 319, 86 N. W. Rep. 305.

[3] Gould v. Barnard, 3 Mass. 199; Hill v. Bloomer, 1 Pin. 463; Hopkins v. Burney, 2 Fla. 42.

In Fleet v. Lockwood, 17 Conn. 233, it was held that an avowry, or suggestion in the nature of an avowry, by the defendant in replevin, is not necessary to authorize the court to render a judgment of return, where the writ is abated or set aside on account of an irregularity or defect in the replevin process. See Potter v. North, 1 Saund. 347, and note 1; Crosse v. Bilson, 6 Mod. 102; Anonymous, 1 Vent. 127; Foot's Case, 1 Salk. 93; Anonymous, id. 94; 18 Vin. Abr. 586, 591-2; Parker v. Mellor, Carth. 398, 1 Ld. Raym. 217; Butcher v. Porter, Carth. 243, Shower, 400; Salkold v. Skelton, Cro. Jac. 519; Wildman v. North, 2 Lev. 92; s. c., *nomine*, Wildman v. Norton, 1 Vent. 249; Allen v. Darby, 1 Show. 99. See, also, Hartgraves v. Duval, 6 Ark. 506.

[4] Drewyour v. Merrell, 112 Mich. 681, 71 N. W. Rep. 486, citing Hohenthal v. Watson, 28 Mo. 360; White v. Van Houten, 51 Mo. 577; Thisler v. Miller, 53 Kan. 520, 36 Pac. Rep. 1060, 42 Am. St. 302; Cobbey on Replevin, § 1170.

[5] See § 1157.

ute. He is, however, generally allowed to recover damages where he is entitled to a return.[1] It is ruled otherwise, however, in Vermont, Massachusetts and Michigan under conditions stated in the note below.[2]

[1] Mikesill v. Chaney, 6 Ind. 52; Ramsey v. Thomas, 45 Mo. 111; Berghoff v. Heckwolf, 26 Mo. 511; Collins v. Hough, 26 Mo. 149; Smith v. Winston, 10 Mo. 299; Dickinson v. Noland, 7 Ark. 25; Haviland v. Parker, 11 Mich. 103; Campbell v. Head, 13 Ill. 122; Broadwell v. Paradice, 81 Ill. 474; Hooker v. Hammill, 7 Neb. 231; Gould v. Scannell, 13 Cal. 430; Bonner v. Coleman, 3 B. Mon. 464; Smith v. Snyder, 15 Wend. 324.

Where the writ was void because the property was not described in it as required by the statute, an assessment of damages was refused; for the right to an assessment given by the statute was limited to cases where the property is described in the writ. Parsell v. Circuit Judge, 39 Mich. 542.

On waiving a return, the defendant is entitled to nominal damages only, where shortly after the property was nominally turned over to the plaintiff by the sheriff, without in fact being removed, it was delivered to third persons, acting in collusion with the defendant, upon a second writ. Joseph v. Brandy, 112 Mich. 579, 70 N. W. Rep. 1101.

[2] In Collamer v. Page, 35 Vt. 387, a replevin suit for a flock of sheep was dismissed because brought in the wrong county. The error in the proceedings was treated as an irregularity, not a want of jurisdiction of the subject-matter. It was held to be the duty of the court to render judgment for return of the property, and without any plea or avowry by the defendant, and that the plaintiff had no right to contest such a judgment on the ground that he owned the property. But a judgment of return, in such a case, was held not conclusive of the right in another action; and the court also held that, after a dismissal of the plaintiff's action on some ground not relating to the merits of the case, the defendant is not entitled to have his right to damages for the taking and detention or improper use of the replevied property tried or adjudicated. The damage sought to be recovered was wool shorn from the sheep after the replevy. See Hoag v. Breman, 3 Mich. 160; Haviland v. Parker, 11 id. 103.

In Ware River R. v. Vibbard, 114 Mass. 458, the court refused an order for return upon this state of facts. Motion was made after nonsuit in replevin for the return of the property, which was a large quantity of imported railroad iron, and for damages for its detention. It appeared by the officer's return that he had replevied the iron and delivered it to the plaintiff, and, by an indorsement upon the writ, that the plaintiff had received it; but it also appeared that from the time of its importation by the defendant it had been in bond under the laws of the United States; that the plaintiff had never obtained actual possession, the warehouse receipt and the custom-house delivery order, the possession of which the parties regarded as a necessary means of obtaining possession, and without which the warehouseman refused to deliver, being in the possession of the defendant, who refused to transfer them to the plaintiff; held, that the defendant, having prevented the plaintiff's obtaining actual possession of the property, was not entitled to damages

§ 1157. Measure of damages. When the defendant is entitled to a return and damages for the detention the [559] general measure of the latter is interest on the value of the property to the date of the judgment.[1] He is entitled to damages for the interruption of his possession, the loss of the use of the goods from the time they were replevied till their restoration, and for any deterioration resulting from the taking or detention, or plaintiff's misuse or want of care.[2] The replevin is to the defendant a wrong; and he is entitled [560] to damages on the same principles as a plaintiff.[3] If the prop-

for its detention, and that, as there had never been an actual change of possession, an order for return was unnecessary.

Under the Michigan statutes a defendant who waives a judgment for the return of the property or for its value is not entitled to damages. Bateman v. Blake, 81 Mich. 227, 45 N. W. Rep. 831.

[1] Schrandt v. Young, 62 Neb. 254, 86 N. W. Rep. 1085; Suydam v. Jenkins, 3 Sandf. 614; Smith v. Dillingham, 33 Me. 384; Barnes v. Bartlett, 15 Pick. 71; McCabe v. Morehead, 1 W. & S. 513; Wood v. Braynard, 9 Pick. 322; Miller v. Whitson, 40 Mo. 97; Hooker v. Hammill, 7 Neb. 231; Moore v. Kopner, id. 291; Hurd v. Gallaher, 14 Iowa, 394; Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. Rep. 462; Dornan v. Benham Furniture Co., 102 Tenn. 303, 52 S. W. Rep. 38.

In Atherton v. Fowler, 46 Cal. 323, the action was brought for hay in May, 1863, and the plaintiff obtained possession at the commencement of the suit, which was finally tried in April, 1871. The defendant obtained a verdict, and judgment thereon was rendered in October, 1872. The value of the hay was taken in pursuance of the opinion in Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462, about a year subsequent to the taking by the replevin, with a view to giving the owner the price he would have realized if he had kept it, and interest on that value from the commencement of the suit; held, it was erroneous to add interest from a date prior to that when the value was taken. Interest was computed on the verdict to the date of the judgment, and this was held erroneous. But see McCarty v. Quimby, 12 Kan. 494; Smith v. Robey, 6 Heisk. 546.

[2] Schrandt v. Young, *supra;* Chapman v. Kerr, 80 Mo. 158; Mix v. Kepner, 81 id. 93; Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. Rep. 462; Hinchey v. Koch, 42 Mo. App. 230; Whitwell v. Wells, 24 Pick. 25; Beveridge v. Welch, 7 Wis. 465.

In Massachusetts depreciation in the value of property is not an element of damages in the defendant's favor except in a suit on the bond. Citizens' Nat. Bank v. Oldham, 136 Mass. 515.

[3] Suydam v. Jenkins, 3 Sandf. 614; Berghoff v. Heckwolf, 26 Mo. 512; Fallon v. Manning, 35 Mo. 274; McArthur v. Lane, 15 Me. 245; Pierce v. Van Dyke, 6 Hill, 613; Dawson v. Wetherbee, 2 Allen, 461; Jansen v. Effey, 10 Iowa, 227; Wilkins v. Treynor, 14 Iowa, 391; Anchor Milling Co. v. Walsh, 20 Mo. App. 107. See § 1152.

Unless it appears that a machine was not carefully housed during the time it was detained and was not

erty is valuable for use the value of the use may be recovered instead of interest.[1] This right is not vested in an officer who prevails in a replevin suit as against a person who has the right to the use because he has no title to the property held by him under process and no right to use it or recover for being deprived of its use. The fact that he may be made to respond to somebody for its use if his levy fails to protect him is immaterial.[2] But if property is taken from an officer by a stranger and his action is dismissed and a return awarded the damages assessed in the defendant's favor, it has been ruled, should include the value of the use. In such a case the officer holds the entire proceeds of the property, including such damages, for the benefit of those who have a right to it.[3] An officer who holds property under process against a mortgagor is entitled, on succeeding against the mortgagee, to recover the amount called for in his writ if the value of it equals or exceeds that sum.[4] In some states judgment for return is not rendered, but for the value, and it is assessed at the time of the replevy together with interest.[5] In others the value is assessed for an alternative judgment to be paid or collected if return cannot be had, or because it can be and is waived. In the former case it is assessed at the date of the trial;[6] in

used, there should be deducted from its fair rental value the damage which would have resulted from the wear and tear of use. Peerless Machine Co. v. Gates, 61 Minn. 124, 63 N. W. Rep. 260.

[1] Adams v. Wright, 74 Conn. 551, 51 Atl. Rep. 537; Boston Loan Co. v. Myers, 143 Mass. 446, 9 N. E. Rep. 805; Allen v. Fox, 51 N. Y. 562; Schrandt v. Young, 62 Neb. 254, 86 N. W. Rep. 1085; Williams v. Wood, 61 Minn. 194, 63 N. W. Rep. 492; Ditmars v. Sackett, 81 Hun, 317, 30 N. Y. Supp. 721. See § 1144.

In determining the value of the use of a threshing machine evidence of its fitness and capacity for earning money is proper, as is evidence that the owner had made contracts for its use, and that the value of the machine to him consisted in its use in performing such contracts. Williams v. Wood, *supra*.

[2] Tandler v. Saunders, 56 Mich. 142, 22 N. W. Rep. 271.

[3] Broadwell v. Paradice, 81 Ill. 474; Burt v. Burt, 41 Mich. 82, 1 N. W. Rep. 936.

[4] Kersenbrock v. Martin, 12 Neb. 374, 11 N. W. Rep. 462.

[5] Messer v. Bailey, 31 N. H. 9; Kendall v. Fitts, 22 N. H. 1; Bell v. Bartlett, 7 N. H. 178.

[6] Chapman v. Kerr, 80 Mo. 158; Mix v. Kepner, 81 id. 93 (overruling earlier cases); Walls v. Johnson, 16 Ind. 374; W. W. Kendall Boot & Shoe Co. v. Bain, 46 Mo. App. 581.

In Treman v. Morris, 9 Ill. App. 237, it was held that the defendant was entitled to the value of the property when taken, and interest from that time; and if the property in-

the other when taken, and then interest is added.[1] Where the alternative judgment is given the value, being collectible only on the contingency of the specific property not being delivered or returned, must be separately assessed.[2] The party injured is entitled to full indemnity for the injury he suffers in consequence of being deprived of his goods by means of a replevin; and the time when their value will be estimated and the manner of the estimate may be varied to meet any peculiarities of the case with a view to adjusting the compensation to the actual loss.[3] Such damages are frequently recovered most beneficially in an action on the bond, as [561] where there is a judgment for return simply and return is not effected.[4] But this is not always the case, since the scope of recovery depends on the terms and comprehensiveness of the obligation and the statute governing the remedies.[5]

creased in value, the increase at the date of the order for return should also be added.

[1] Just v. Porter, 64 Mich. 565, 31 N. W. Rep. 444; Nitz v. Bolton, 71 Mich. 388, 39 N. W. Rep. 15; Hanselman v. Kegel, 60 Mich. 550, 27 N. W. Rep. 678; Berthold v. Fox, 13 Minn. 501, 97 Am. Dec. 243; Brizsee v. Maybee, 21 Wend. 144; McCabe v. Morehead, 1 W. & S. 513; Swift v. Barnes, 16 Pick. 194; Ormsbee v. Davis, 18 Conn. 555; Walker v. Osgood, 53 Me. 422; Smith v. Dillingham, 33 Me. 384; West v. Caldwell, 23 N. J. L. 736; Huggeford v. Ford, 11 Pick. 233; Hopkins v. Ladd, 35 Ill. 178; Barnes v. Bartlett, 15 Pick. 71; Hurd v. Gallaher, 14 Iowa, 394; Middleton v. Bryan, 3 M. & S. 155; Story v. O'Dea, 23 Ind. 326; Kreibohm v. Yancey, 154 Mo. 67, 87, 55 S. W. Rep. 260.

In Darling v. Tegler, 30 Mich. 54, it was held that where judgment is given in favor of a defendant for the value of his special interest that includes all his damages, and to give other damages is erroneous.

In Oklahoma the defendant who has been deprived of the possession of property may recover the price at which he could have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such purchase. Stats. of 1893, sec. 2650; George R. Barse Live Stock Commission Co. v. McKinster, 10 Okl. 708, 64 Pac. Rep. 14, modifying Wade v. Gould, 8 Okl. 690, 59 Pac. Rep. 11.

[2] Sayers v. Holmes, 2 Cold. 259; Pickett v. Bridges, 10 Humph. 172.

[3] Parker v. Simonds, 8 Met. 205; Eaton v. Caldwell, 3 Minn. 134; Berry v. Vantries, 12 S. & R. 89; Backenstoss v. Stahler, 33 Pa. 257, 75 Am. Dec. 592. The text is quoted in Clow v. Yount, 93 Ill. App. 112, 117, and its doctrine held to be applicable to the rights of a plaintiff.

[4] §§ 501–504; Swift v. Barnes, 16 Pick. 194; Howe v. Handley, 28 Me. 251; Smith v. Dillingham, 33 Me. 384. See Hemstead v. Colburn, 5 Cranch, C. C. 655; also Nickerson v. California Stage Co., 10 Cal. 520.

[5] See White v. Van Houten, 51 Mo. 577.

§ 1158. Special and consequential damages. In the action of replevin under statutes or a practice allowing a recovery of the damages for detention special and consequential, and even exemplary, damages[1] may be recovered. The expenses actually incurred in procuring teams and appurtenances for the purpose of removing ice, the subject of the suit, were allowed to be recovered, they having been rendered useless by the wrongful replevin.[2] But damages resulting from the possible loss of customers were too remote and contingent, and losses caused by inability to fulfill existing contracts were not recoverable because the supply necessary for that purpose might have been obtained in the market.[3] The defendant cannot recover for counsel's services in defense of the action.[4] A manufacturer from whom the entire machinery of his cloth-printing factory, in running order and actual use, was replevied, including steam apparatus for supplying the power, took judgment for a return and the damages assessed by computing interest on the appraised value of the property from the date of the writ to that of the judgment, under an agreement expressly provided to be without prejudice to his action on a replevin bond. On demand of the officer upon the writ of return tender was made of all the machinery except the steam apparatus, with an offer to pay the value of that or replace it. The tender was not accepted and the writ was returned in no part satisfied, and suit brought on the bond. It was held, 1, that the officer had a right to treat the property as an organized whole and refuse the offer to return part of it; 2, that the manufacturer's claim for damages in the action of replevin included compensation for the general inconvenience and loss resulting from the interruption of his possession and for the expense, trouble and delay of restoring the factory to its former con-
[562] dition as well as interest on the value of the property; but, 3, that the claim was an entire claim, and no portion of it recoverable in the suit on the bond, notwithstanding the

[1] McCabe v. Morehead, 1 W. & S. 513; Cable v. Dakin, 20 Wend. 172; Brizsee v. Maybee, 21 Wend. 144.

Sickness resulting from the manner in which a writ of replevin is served cannot be recovered for unless it is specially pleaded. Bateman v. Blake, 81 Mich. 227, 45 N. W. Rep. 831.

[2] Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. Rep. 462.

[3] Id.

[4] Black v. Hilliker, 130 Cal. 190, 62 Pac. Rep. 481.

proviso in the agreement under which he took his judgment; and 4, that the measure of his damages in the suit on the bond was the sum which, under the ordinary circumstances attending a sale, might reasonably be agreed on as a fair price for the property between a seller desirous of selling and a buyer desirous of buying it as a whole, to be used in the place from which it was taken and for the purposes for which it was intended and arranged.[1] The damages recoverable are for the withholding or detention of the property, "not all damages generally which may be connected with the subject in dispute or grow out of the relations of the several parties to each other or to the property. They must arise from, and be incident to, the contest over possession of the property, and unless they do so arise they are not recoverable merely because connected with the transaction by reason or virtue of which the plaintiff's alleged right of taking possession accrued."[2]

An interesting case arose in Nevada illustrating, and containing an instructive discussion of, the distinction between matters which must be estimated as part of the value if return cannot be had and damages which are to be paid or collected in any event. An action of replevin was brought for a flock of sheep, and was pending for several years. The defendant, in her answer, claimed to be their owner and demanded a return. She succeeded in establishing her right to that judgment. During the pendency of the action the flock, which was large, was largely increased by lambs, and the plaintiff yearly derived considerable sums from the wool which he sheared and marketed; and during this period many of the sheep died without his fault, and he bestowed much care, labor and attention and incurred considerable expense in the keeping, preservation and management of the flock, and in shearing and marketing the wool. These facts were the subject of supplemental answers. The trial court treated not only the flock replevied, but the lambs added by natural increase and the wool shorn after the plaintiff got possession, as constituent parts of the property in controversy and adjudged a return of each separately, or, if it could not be had, that their value respectively be collected. Evidence of the

[1] Stevens v. Tuite, 104 Mass. 328.

[2] Schrandt v. Young, 62 Neb. 254, 86 N. W. Rep. 1085.

necessary cost and expense of keeping and preserving the flock, raising the lambs, shearing and marketing the wool, [563] etc., was rejected.[1] On appeal it was held that the judgment was erroneous; that the lambs were a constituent part of the property and might be included in the judgment for return, and the alternate value be paid,[2] but that the wool must be recovered for as damages for the use of the property, and from these damages should be deducted the reasonable and necessary labor and expense of keeping, preserving and managing the flock, and shearing and marketing the wool. It was also considered that the plaintiff should not be charged with the loss of such sheep as had died without his fault.[3]

[569] The defendant is entitled to damages for the time the sheriff holds the property for the plaintiff to give security, [570] where he fails to furnish it, and the property is returned to the defendant and he recovers in the action. He is en- [571] titled to damages for that disturbance of his possession; and he may recover interest on the value and any depreciation in consequence of the taking and expense of replacing the property.[4] The expense incurred in obtaining property to take the place of that converted and adapting it to the purpose for which the former was used, and the loss caused by interrupting business, may be recovered. Where these elements were recognized and there was also a recovery of the rental value of the property, it was not permissible in a judgment for its return to award the value of such property.[5]

§ 1159. Mitigation of damages. The plaintiff may show on the assessment of value and damages under a judgment for return and damages for the detention that shortly after the delivery of the property to him the defendant repossessed

[1] The following is sec. 202 of the Nevada practice act: "In an action to recover the possession of personal property judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention or the value of the use thereof. If the property have been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or the value thereof in case a return cannot be had, and damages for the taking and withholding the same, or the value of the use thereof."

[2] Deck v. Smith, 12 Neb. 389, 11 N. W. Rep. 852.

[3] Buckley v. Buckley, 12 Nev. 423. See Sherman v. Clark, 24 Minn. 37.

[4] Morris v. Baker, 5 Wis. 389.

[5] Adams v. Wright, 74 Conn. 551, 51 Atl. Rep. 537.

himself of the greater part of it.[1] It is held in some states that where an animal replevied dies without the fault of the plaintiff while in his possession pending the suit, the fact may be proved to exonerate him from liability for its value.[2] In Arkansas it was held that death of the property after judgment does not relieve the party bound to deliver.[3] And in Kentucky and Alabama the party having a wrongful possession is liable for the property though it perish without his fault.[4] In Illinois it is held that where a replevin suit is dismissed and the court proceeds to assess the plaintiff's damages for the detention of the property, it is competent for the plaintiff to prove that the defendant is a mere pledgee of the property to secure a debt from the plaintiff, as the defendant would not in such a case be entitled to recover anything for its use.[5] In Michigan where a plaintiff is nonsuited the defendant has, by statute, a right to a return of the property, or to waive return and recover the value. If he waives a return he is entitled to a judgment for its full value; and in an action on the [572] replevin bond afterwards the measure of damages is the amount of the judgment; the obligors cannot show in mitigation that the defendant in replevin was but a part owner of the property.[6] A plaintiff cannot mitigate his liability to the defendant by delivering a portion of the property to the receiver of the latter's vendor unless it is established, between the receiver and the defendant, that the former was entitled thereto.[7] Payment of rent for the use of the property in suit

[1] De Witt v. Morris, 13 Wend. 496.

In Case v. Babbitt, 16 Gray, 278, the action was against the officer who served the writ, by the defendant in replevin, for taking an informal bond, after obtaining a dismissal of the action on that ground. The court held that the officer might show in mitigation that the property replevied, at the time of the service of replevin, was, and has since remained, the property and in the possession of the plaintiff in the replevin.

In Archer v. Long, 47 S. C. 556, 25 S. E. Rep. 84, the jury found for the plaintiff as to the right of possession and awarded a gross sum in case of non-delivery. A portion was delivered; the defendant being unable to deliver the whole. The court was equally divided as to the right of the defendant to show the value of the part not delivered.

[2] Walker v. Osgood, 53 Me. 422. See § 1151.

[3] May v. Jameson, 11 Ark. 368.

[4] See §§ 1151-1153.

[5] McArthur v. Howett, 72 Ill. 358. See Levis v. Lochiel Iron & S. Works, 129 Pa. 238, 18 Atl. Rep. 1120; § 1157.

[6] Williams v. Vail, 9 Mich. 162.

[7] Yallop-De Groot Co. v. Minneapolis, etc. R. Co., 33 Minn. 482, 24 N. W. Rep. 185.

may be proven in mitigation, notwithstanding the claim that the defendant's title was divested by a sale under a mortgage.[1] If a mortgagee obtains possession of the mortgaged property and sells it for more than is due him the defendant may recover, in the replevin action, the excess.[2]

§ 1160. Recovery affected by interest in property. Where the plaintiff or defendant is entitled to recover the value the same principles apply as in trover or trespass in regard to recovering full value or only that of his special interest.[3] If the party made liable is a stranger, and has no right or title whatever in the property, the judgment will be for the full value to the party whose possession or right thereto has been invaded.[4] If a party has a general or special property in goods, either alone or in connection with others, he can maintain replevin in the *detinet* against a stranger; and the mere fact that the plaintiff owns the property with others, and not alone, is not a bar, either under the plea of *non detinet* or when it is specially pleaded; but it is proper matter of a plea in abatement.[5] On the other hand, where the party recovering has but a limited interest, and is under no duty to account for any surplus to any other party, and the defendant represents that residue, the recovery will be limited to the special interest of the prevailing party.[6] If property is replevied from an officer

[1] Collins v. Bellefonte Central R. Co., 171 Pa. 243, 259, 33 Atl. Rep. 331.

[2] Rhoads v. Gatlin, 2 Colo. App. 96, 29 Pac. Rep. 1019.

[3] §§ 1097, 1136, 1137; Gage v. Allen, 84 Wis. 323, 54 N. W. Rep. 627; Aultman Co. v. McDonough, 110 Wis. 263, 268, 85 N. W. Rep. 980; Creighton v. Haythorn, 49 Neb. 526, 68 N. W. Rep. 934; Hall v. Bramell, 87 Mo. App. 285; Dillard v. McClure, 64 id. 488; Witkowski v. Hill, 17 Colo. 372, 30 Pac. Rep. 55; George R. Barse Live Stock Commission Co. v. Adams, 2 Ind. Ty. 119, 48 S. W. Rep. 1023; Guy v. Doak, 47 Kan. 370, 27 Pac. Rep. 968; Union Nat. Bank v. Moline, etc. Co., 7 N. D. 201, 219, 73 N. W. Rep. 527.

If a special ownership is pleaded it must be proven; there cannot be a recovery on proof of general ownership. Suckstorf v. Butterfield, 54 Neb. 757, 74 N. W. Rep. 1076.

[4] Allen v. Butman, 138 Mass. 586; Stevenson v. Lord, 15 Colo. 131, 25 Pac. Rep. 313; First Nat. Bank v. Crowley, 24 Mich. 492; Frei v. Vogel, 40 Mo. 149; Dilworth v. McKelvy, 30 Mo. 149; Nelson v. Leichtenmeyer, 49 Mo. 56; Fallon v. Manning, 35 Mo. 271; Morss v. Stone, 5 Barb. 516.

[5] Wright v. Bennett, 3 Barb. 451.

If the plaintiff is a lienholder and the property has been sold for more than his claim and interest thereon, the amount of the claim with interest may be recovered under an ordinary petition. Dolan v. Van Demark, 25 Kan. 304.

[6] Hickman v. Dill, 32 Mo. App. 509; Baldridge v. Dawson, 39 id. 527; Allen v. Judson, 71 N. Y. 77; Lillie v.

who holds it under process, with no other interest in it than that of the creditor whom he represents, and the officer is successful, his recovery cannot exceed the amount owing by the debtor and the costs of the suit.[1] The amount called for by writs which are received by an officer after he has been served with process in the replevin suit and has delivered the property to the plaintiff is not to be regarded.[2] Ordinarily it is incumbent upon the officer to prove the value of the property; but when the plaintiff admits on the record the value of the defendant's possession and no evidence is given as to the general value of the property, it will be presumed that such value is equal to or exceeds the amount admitted by the plaintiff as the value of the defendant's special interest.[3] Where property is replevied from an officer who holds it under a writ of attachment issued on a debt not due, there cannot be a recovery thereof unless he proves that the jurisdictional steps preceding the issue of the writ have been taken.[4] Where goods are wrongfully taken in replevin by a sheriff who holds them under attachments the measure of damages is the loss accruing to the attachment plaintiffs because of the deprivation of the right to have their writ executed; the value of the property is to be fixed by its value in the only market and manner in which the sheriff could have disposed of it.[5] If the defendant's right of possession expires before trial judgment for return will not be ordered and damages for detention will be limited accordingly.[6] The same rule applies to a plaintiff

Dunbar, 62 Wis. 198, 22 N. W. Rep. 467, 51 Am. Rep. 718; Cruts v. Wray, 19 Neb. 581, 27 N. W. Rep. 634; Schwab v. Owens, 10 Mont. 381, 25 Pac. Rep. 1049; Union Lumber Co. v. Tronson, 36 Wis. 126; Hass v. Prescott, 38 Wis. 146; Wolfley v. Rising, 12 Kan. 535; Weber v. Henry, 16 Mich. 399; Jennings v. Johnson, 17 Ohio, 154, 49 Am. Dec. 451; Scrugham v. Carter, 12 Wend. 131; Dodge v. Chandler, 13 Minn. 114; Walrath v. Campbell, 28 Mich. 111. See Veazie v. Somerby, 5 Allen, 280; Empire State Type Founding Co. v. Grant, 44 Hun, 434.

[1] Clark v. Lamoreaux, 70 Wis. 508, 36 N. W. Rep. 393; Smith v. Phillips, 47 Wis. 202, 2 N. W. Rep. 285; Sloan v. Coburn, 26 Neb. 607, 42 N. W. Rep. 726, 4 L. R. A. 470; Gates v. Parrott, 31 Neb. 581, 48 N. W. Rep. 387; Gamble v. Wilson, 33 Neb. 270, 50 N. W. Rep. 3.

[2] Sloan v. Coburn, *supra;* Merrill v. Wedgewood, 25 Neb. 283, 41 N. W. Rep. 149.

[3] Gamble v. Wilson, *supra.*

[4] Gamble v. Wilson, *supra.*

[5] Merchants' Nat. Bank v. McDonald, 63 Neb. 363, 377, 88 N. W. Rep. 492, 89 id. 770.

[6] Deal v. Osborne, 42 Minn. 102, 43 N. W. Rep. 835; Wheeler v. Train, 4 Pick. 168.

when he is entitled to recover value and damages; he can only recover the value of the right while it existed and damages for detention.[1]

[573] § **1161. Recoupment.** Set-off does not exist in replevin, but when the goods are the subject of a lien or charge it may be enforced by way of recoupment; for the charge is inseparable from the thing itself and, therefore, when the value of the thing is to be allowed in damages the charge may be admitted to reduce them by way of recoupment in order to do justice to both parties.[2] So where property is distrained for rent and replevied the plaintiff may answer the justification of seizure for rent by way of recoupment that the landlord has failed to keep his covenants in the lease.[3] Damages arising out of a breach of warranty of the property replevied, including damages for the loss of time and expenses incurred in trying to operate such property, may be counter-claimed. Such counter-claim arose out of the transaction by which the property was sold and is connected with the subject of the action, the sale being made with a warranty, and the replevin action being brought by a mortgagee to recover possession.[4]

§ **1162. Part of property found for each party.** On the issue made by the plea of property in the defendant a jury may find that a part of the property belonged to the plaintiff and assess damages for its detention; and that the residue did not belong to the plaintiff and assess damages for the defendant. In such case the verdict is considered as rendered upon an issue, because effect is given to it in the same manner as though the declaration had contained two counts for the respective articles, or the defendant had avowed for each separately.[5] Each party may have judgment for damages and

[1] Barham v. Massey, 5 Ired. 192.

[2] Macky v. Dillinger, 73 Pa. 85; Babb v. Talcott, 47 Mo. 343; Cooper v. Kipp, 52 App. Div. 250, 65 N. Y. Supp. 379; § 183.

[3] Lindley v. Miller, 67 Ill. 248; Fairman v. Fluck, 5 Watts, 516; Phillips v. Monges, 4 Whart. 226; Peck v. Brewer, 48 Ill. 55; Peterson v. Haight, 3 Whart. 150; Warner v. Caulk, id. 193; Nichols v. Dusenbury, 2 N. Y. 283; Guthman v. Castleberry, 49 Ga. 272; Wade v. Halligan, 16 Ill. 508; Hatfield v. Fullerton, 24 Ill. 279.

[4] Aultman Co. v. McDonough, 110 Wis. 263, 85 N. W. Rep. 980.

[5] Williams v. Beede, 15 N. H. 483; Powell v. Hinsdale, 5 Mass. 342; Wright v. French, 94 Pa. 26.

costs as far as he is successful.[1] And doubtless the general power of the court will extend to the setting off of these mutual recoveries and issuing execution for the balance where no reason exists for a contrary course.[2]

[1] Id.; Brown v. Smith, 1 N. H. 36; Wright v. Mathews, 2 Blackf. 187; Clark v. Keith, 9 Ohio, 72; Seymour v. Billings, 12 Wend. 286; Vollum v. Simpson, 2 Bos. & P. 368; McLarren v. Thompson, 40 Me. 284; Poor v. Woodburn, 25 Vt. 239; Lanyon v. Woodward, 65 Wis. 543, 27 N. W. Rep. 337.

[2] Poor v. Woodburn, Lanyon v. Woodward, *supra*.

CHAPTER XXX.

FRAUD.

§ 1163–1165. Scope of the natural and proximate consequences.
1166. False representations.
1167. Same subject; materiality.
1168. Same subject; reliance upon representations.
1169. Same subject; defendant's belief in representations.
1170. Same subject; representations need not be made to plaintiff.
1171. The measure of damages; general rule.
1172. Same subject; another rule.
1173, 1174. Same subject; other elements of damage.
1175, 1176. Remote and contingent damages.
1177. Expenses of litigation.
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1180 Pleading.

§ 1163. Scope of the natural and proximate consequences. [574] Fraud is an odious tort, and when actual injury proceeds from it damages are allowed as for other tortious injuries. It is necessary to a cause of action for fraud that it produce actual injury; damage is of the gist of the action; in other words, fraud and damage must concur to give a cause of action.[1] By "damage," as here used, is meant legal wrong,

[1] McConnel v. Wright, [1903] 1 Ch. 546; Zabriskie v. Smith, 13 N. Y. 322; Bennett v. Terrill, 20 Ga. 83; Hanson v. Edgerly, 29 N. H. 343; Upton v. Vail, 6 Johns. 181; Tryon v. Whitmarsh, 1 Met. 1, 35 Am. Dec. 339; Carvill v. Jacks, 43 Ark. 454; Holton v. Noble, 83 Cal. 7, 23 Pac. Rep. 58; Brown v. Blunt, 72 Me. 415; London & F. Ins. Co. v. Liebes, 105 Cal. 203, 38 Pac. Rep. 691; Knowles v. Elyton Land Co., 88 Ga. 642, 15 S. E. Rep. 675; Carrington v. Omaha Life Ass'n, 59 Neb. 146, 80 N. W. Rep. 491; Potter v. Necedah Lumber Co., 105 Wis. 25, 80 N. W. Rep. 88, 81 id. 118; Bank v. Byers, 139 Mo. 627, 41 S. W. Rep. 325, quoting the text.

"If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable." Pomeroy's Eq., § 898; Wainscott v. Occidental Building & Loan Ass'n, 98 Cal. 253, 33 Pac. Rep. 88.

The question of whether damage resulted to the vendee of stock from its purchase depends upon the value of the stock when its purchase was negotiated, and not upon what he accomplished thereafter in the management of the corporation. Townsend v. Felthousen, 156 N. Y. 618, 625, 51 N. E. Rep. 279.

not, necessarily, financial loss. The violation of a legal right, as by fraudulent interference with the right to dispose of one's property for a limited use, though he receive full compensation for it, is ground for the rescission of the conveyance, damage having resulted to others than the plaintiff from the fraud.[1] Sometimes the wrong is done directly by the defendant; at other times the injured party is duped into becoming the immediate and unwilling agent to consummate it. He is entitled to recover compensation for the injury, including all the natural and proximate consequences of the fraud. In determining the scope of these consequences the law applies no new principle, but that which guides and controls the inquiry of damages in all cases of tort, namely, that the wrong-doer is answerable for all those consequences of his misconduct which happen in the natural course of things and were to be expected to ensue according to the general experience of mankind.[2] A fraud may be acted upon by the owner of property by recalling his order to sell it because of representations that certain fictitious sales were genuine.[3]

Whenever one person by breach of confidence, deception or departure from the course of fair dealing deprives another of his property or any pecuniary advantage the law gives the latter adequate compensation for the injury in damages as for a fraud.[4] If the plaintiff or injured party is not chargeable with negligence in yielding to the deceit,[5] it is immaterial whether the party who practices the fraud is the chief actor in causing the loss or whether the injured party, while under the influence of the deception, contributes to his own injury

[1] Brett v. Cooney, — Conn. ——, 53 Atl. Rep. 729.

[2] § 15; Potter v. Necedah Lumber Co., 105 Wis. 25, 31, 80 N. W. Rep. 88, quoting the text; Crater v. Binninger, 33 N. J. L. 513; Weaver v. Shriver, 79 Md. 245, 530, 30 Atl. Rep. 189.

[3] Fottler v. Moseley, 179 Mass. 295, 60 N. E. Rep. 788.

[4] Shaw v. Holland, [1900] 2 Ch. 305; Montgomerie's Brewery Co. v. Blyth, 26 Vict. L. R. 612 (these cases are dealt with, so far as the measure of damages is concerned, in § 1123); Hayward v. Leeson, 176 Mass. 310, and cases cited on 318, 57 N. E. Rep. 656, 49 L. R. A. 725; Wilson v. Nichols, 72 Conn. 173, 43 Atl. Rep. 1052; Leonard v. Springer, 197 Ill. 532, 64 N. E. Rep. 299.

[5] See Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. Rep. 54, and cases cited in opinion; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. Rep. 188.

One guilty of fraudulent conduct, whereby he induces another to act to his prejudice, cannot be heard to allege negligence on the part of such other. Leonard v. Springer, *supra*.

in a manner which was antecedently probable and might and should have been foreseen. A few examples will make these [575] propositions clear. An auctioneer pretended to have received a bid not actually made, and thus ran up the price of the property he was employed to sell from $20,000, which was the last real bid, to $40,000. The vendee had no knowledge of this deception. In a suit for redress it was decreed that the vendor should refund $20,000, the excess above the highest bid.[1] A broker undertook to invest money for a customer upon a safe bond, well secured by mortgage; he was employed by and received remuneration from a borrower, which he did not disclose to the lender, to whom he falsely represented that the security offered was ample. Such broker was held liable to make good the loss arising from the insufficiency of the security.[2] Another broker was employed to sell real estate under a contract by which he was to have as his commission all he could obtain above $6,000. He procured G. to become a joint purchaser with himself for $8,000, concealing from him that he was acting as the vendor's agent. After the consummation of the sale by which the vendor conveyed three-fourths to G., who paid $6,000, and one-fourth to the broker, who paid $2,000, and which was, according to the vendor's agreement, refunded to him as commission, it was held that the transaction as between the broker and G. was a fraud on the latter and that the law would not permit the former to retain the advantage he had gained.[3] Where a debtor was induced by fraudulent representations to go into a foreign state for the purpose of being arrested there, he was entitled to recover the money paid to secure his release,[4] and, under the facts of the case, also a sum paid by him to settle another suit.[5]

[1] Veazie v. Williams, 8 How. 134.

[2] Turnbull v. Gadsden, 2 Strobh. Eq. 14; Bacon v. Bronson, 7 Johns. Ch. 194, 11 Am. Dec. 449; Horne v. Walton, 117 Ill. 130, 141, 7 N. E. Rep. 100, 103.

[3] Grant v. Hardy, 33 Wis. 668; Johnson v. Gavitt, 114 Iowa, 183, 86 N. W. Rep. 256; Bergeron v. Miles, 88 Wis. 397, 60 N. W. Rep. 783, 43 Am. St. 911; Cook v. Southern Columbian Climber Co., 75 Miss. 121, 129, 21 So. Rep. 795; King v. White, 119 Ala. 429, 24 So. Rep. 710.

In a similar case the perpetrator of the fraud was liable for interest on the difference between the buying and the selling price. Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. Rep. 40.

[4] Sweet v. Kimball, 166 Mass. 332, 55 Am. St. 406, 44 N. E. Rep. 243; Clark v. Woods, 2 Ex. 395, 406; Grainger v. Hill, 4 Bing. N. C. 212.

[5] Sweet v. Kimball, *supra*.

§ 1164. Same subject. Where several persons are engaged in a joint enterprise for their mutual benefit each has a right to demand and expect from his associates good faith in all that relates to their common interest; and no one of them will be permitted to take to himself a secret and separate advantage to the prejudice of the others; and where, unknown to his associates, one causes to be transferred to the association property previously purchased by himself, at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made. Thus, four persons owning and having interests in certain oil lands which cost them about $30,000, agreed to combine their interests to organize a company and transfer the land to it at a price largely [576] above its cost, and divide the profits. To carry out this purpose they procured a subscription paper to be drawn up by which the subscribers agreed to pay the sums subscribed for "the purchase of property," specifying therein the lands mentioned, at the sum of $125,000. Each of them subscribed $5,000 and caused certain others to sign as decoy subscriptions for about one-half the amount to be subscribed. These subscriptions were not intended to be paid, and were not in fact paid, although so marked. The plaintiffs, induced to believe by the fraudulent assurances of one of the originators of the scheme and of their agent that the lands originally cost $125,000, and upon the belief that they became subscribers on a footing of equality with the others, subscribed also and paid in their subscriptions, as did others, to the amount required. The moneys so paid were received and divided by the four associates. A company was thereupon organized, the property transferred to it and the stock taken in payment and divided among the subscribers, as well those who had not as those who had paid, in proportion to their subscriptions. The plaintiffs subsequently made loans to the company, and under executions issued upon judgments rendered thereon sold a portion of the lands. In an action for the fraud it was held that said four associates were each and all liable. 1st, because putting the subscription paper in circulation with their names subscribed, under the circumstances stated, was a gross fraud upon every subscriber ignorant of the facts; 2d, because the original purchases inured to the benefit of the *bona fide* sub-

scribers, and in receiving and dividing the large profits a fraud was perpetrated upon them; 3d, because the four associates might be regarded as partners in that adventure, and all were responsible for false representations made by either or by their agent; that the plaintiffs could not, on account of such fraud, recover all the moneys paid by them, because they could not restore said associates to the position they were in before the transfer to the company; but that such associates could be required to account for the profits made upon the lands thus fraudulently appropriated, and the plaintiffs could recover their *pro rata* share.[1]

[577] **§ 1165. Same subject.** In such cases the fraud consists in the wrong-doer appropriating to himself by deceptive practices profits belonging to the injured party; the undue gain of the defrauding party is the amount of the injury to the defrauded party. The latter is in all cases entitled to be made good for the injury suffered, and the advantage gained by the fraud is not the measure of that injury, though, as in the foregoing instances, the gain of one and the loss to the other may be the same amount. An interesting and instructive case arose in New Jersey, and was decided in the court of errors and appeals in 1869. As an example it illustrates the scope of natural and proximate consequences taken into account to give compensation for injury and loss caused by fraud. The defendant had purchased, in connection with another party, a tract of oil lands. Proposing to form an oil company, he applied to the plaintiff and solicited him to become a member. The defendant represented that the original cost of the land was $28,000, and that the scheme would require a working capital of $4,000, making the amount of immediate investment $32,000. His proposition was to divide the property into eight shares of $4,000 each, one of which he offered to the plaintiff, who accepted and paid for it. In a few months the associates, finding themselves in debt, each paid in the further sum of $500. A small portion of the prop-

[1] Getty v. Devlin, 54 N. Y. 403. See Pittsburg Mining Co. v. Spooner, 74 Wis. 307, 42 N. W. Rep. 259; St. Paul Distilling Co. v. Pratt, 45 Minn. 215, 47 N. W. Rep. 789; Gruber v. Baker, 20 Nev. 453, 23 Pac. Rep. 858, 9 L. R. A. 302; Leeds & H. Theatres of Varieties, [1902] 2 Ch. 809; Rutledge v. Tarr, 95 Mo. App. 265, 69 S. W. Rep. 22.

erty was subsequently sold with the assent of all the members for $16,000. The property purchased originally had been conveyed to the defendant in trust for the members of the association. The speculation turned out a failure. The false representation relied on to support the action for fraud was that relating to the cost of the property. The real price paid did not exceed $18,000. Other facts in the case are referred to as giving this false representation force to induce the plaintiff to make the purchase at the price paid. The trial court instructed that the proper measure of damages was the entire loss sustained by the plaintiff in the transaction into which he was inveigled by the fraud of the defendant. A verdict was given accordingly, but erroneously ignoring the value of the plaintiff's interest in the land standing in the defendant's name in trust. The defendant contended for reversal on the ground that the proper measure of damages was one- [578] eighth of the difference between $18,000, the real cost of the property, and $28,000, the false price, constituting the fraudulent representation. The measure of liability adopted was held erroneous; the defendant was bound to respond for the moneys lost by the plaintiff in the speculation without fault on his part.[1]

The directors of an insolvent national bank are personally liable to one who has purchased stock thereof for damages sustained because of its insolvency when he was induced to make such purchase by false representations of solvency contained in reports made by the bank to the comptroller of the currency and attested by the directors and published in pursuance of law.[2] It is immaterial that the directors did not know that the statements in such reports were untrue, and that they had no intention to deceive in making them.[3] Liability of the

[1] Crater v. Binninger, 33 N. J. L. 513. The opinion specially refers, on the question of damages, to Cary v. Gruman, 4 Hill, 627; Van Epps v. Harrison, 5 id. 63; Medbury v. Watson, 6 Met. 257. See Rohrschneider v. Knickerbocker L. Ins. Co., 76 N. Y. 216, 32 Am. Rep. 290.

[2] Stuart v. Bank of Staplehurst, 57 Neb. 569, 78 N. W. Rep. 298.

[3] Gerner v. Mosher, 58 Neb. 135, 78 N. W. Rep. 384, 46 L. R. A. 244. It is said in the opinion that the following authorities to some extent sustain the doctrine that a director of a bank is liable for damages resulting from permitting a statement to be held out to the public that the institution was solvent, even though the director was unaware that such report was false: Delano v. Case, 121 Ill. 247, 12 N. E. Rep. 676; Kinkler v.

directors to depositors and persons who have made loans on the security of bank stock or purchased the same in reliance on the published statements of bank officers has been declared in several cases.[1] But such liability does not attach to the bank in favor of one who loans money on its shares in reliance on the statements made by its directors in their reports made pursuant to law.[2] Promoters of a corporation who, before any capital stock has been issued to the public, cause one-third of it to be issued to themselves as compensation for their services, and then invite the public to subscribe to the stock, making no statement of such action, are liable to account for the net profits they received, less the expenses of the formation of the corporation paid by them.[3]

Where the vendor of a mare falsely and fraudulently represented her to be perfectly gentle and kind and the purchaser, confiding in the truth of the representation, attempted to drive her soon after the purchase before a buggy, and she by running and kicking broke the buggy, and he broke one of his legs in jumping to the ground to save himself, he was held entitled to recover, among other things, for the injuries to himself, and to the buggy, if the jury should find that they resulted from the viciousness of the mare and were the probable and natural consequences of the defendant's fraud.[4] The same rule and scope of responsibility is recognized in cases of sales of domestic animals known by the vendor to have a contagious disease, and either warranting them to be sound or even concealing the fact of their having such disease. The association of such animals with others is a possible consequence of

Junica, 84 Tex. 119, 19 S. W. 359; German Savings Bank v. Wulfekuhler, 19 Kan. 60; Salmon v. Richardson, 30 Conn. 360; Morse v. Switz, 19 How. Pr. 275.

[1] Tate v. Bates, 118 N. C. 287, 24 S. E. Rep. 482, 2 Am. St. 81; Solomon v. Bates, 118 N. C. 311, 24 S. E. Rep. 478, 54 Am. St. 725; Seale v. Baker, 70 Tex. 289, 7 S. W. Rep. 742; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. Rep. 915; Merchants' Nat. Bank v. Thoms, 28 Weekly L. Bul. 164 (Cincinnati Super. Ct.). See s. c., id. 137, on the question of privity between the pledgee of bank stock and the bank directors who had made statements concerning the condition of the bank for the purpose of securing additional deposits.

[2] Merchants' Nat. Bank v. Armstrong, 65 Fed. Rep. 932. This case is considered in § 1170.

[3] Hayward v. Leeson, 176 Mass. 310, 322, 57 N. E. Rep. 656, 49 L. R. A. 725.

[4] Sharon v. Mosher, 17 Barb. 518; Allen v. Truesdell, 135 Mass. 75.

the sale and the ignorance of the purchaser that they have the disease; and, therefore, such a sale is a fraud, and the ven- [582] dor is held liable for any loss in respect to the animals sold, as well as by communication of the disease to others.[1] Where the plaintiff had invented a certain medicine and the defendant prepared an inferior article which he sold as and for the medicine of the plaintiff, it was held to be a fraud for which the plaintiff might maintain an action without proof of special damage.[2] The purchaser of a vessel falsely represented by the seller to be eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, was held entitled to recover as part of his damages those occasioned by such sending, she having been condemned in a foreign port.[3]

§ 1166. False representations. A large number of the cases of fraud in which damages are sought are those where the deceit consists of false representations. The principle of compensation for the injury readily adapts itself to each individual case, though the class is of infinite variety; it embraces very obviously the direct and immediate injury; it extends, also, as has been shown, to all the natural and proximate consequences, and these are construed to comprehend all those which ensue naturally from the fraud and could be foreseen as its probable effect according to the usual course of events and the general experience. A count for deceit averring that the defendant, who was employed by the plaintiff to procure a lease, represented that the lessor required a premium of 150*l.*, whereas he in fact only required 100*l.*, whereby the defendant fraudulently obtained from the plaintiff 50*l.*, which he converted to his own use, was held sufficient.[4] A fraudulent misrepresentation may result from a person's conduct as well as be made in words; it is then usually a fraudulent concealment. Thus, a vendor is liable in an action for deceit if he sells an article having a secret defect rendering it

[1] Mullett v. Mason, L. R. 1 C. P. 559; Wintz v. Morrison, 17 Tex. 372, 67 Am. Dec. 658; Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476; Faris v. Lewis, 2 B. Mon. 375; Bradley v. Rea, 14 Allen, 20; Marsh v. Webber, 13 Minn. 109, 16 id. 418; Langdon v. Sherrod, 21 Iowa, 518; Johnson v. Wallower, 18 Minn. 288, 15 id. 472; Smith v. Green, 1 C. P. Div. 92.

[2] Thomson v. Winchester, 19 Pick. 214.

[3] Tuckwell v. Lambert, 5 Cush. 23.

[4] Pewtriss v. Austen, 6 Taunt. 522.

[583] essentially less valuable than it appears for such price as it is apparently worth. Knowing the defect and not revealing it, and knowing or believing that the purchaser would not buy if he knew of its existence, is a fraud.[1] Wherever confidence is reposed the law exacts frank truthfulness; the truth and the whole truth. In Bench v. Sheldon[2] the court say: "In the case of the sale of property the law presumes that the purchaser reposes confidence in the vendor as to all such defects as are not within the reach of ordinary observation, and therefore it imposes upon the vendor the duty to disclose fully and fairly his knowledge of all such defects."[3] Where one undertakes to recommend another as worthy of credit, either voluntarily or in answer to inquiry, even statements which imply only a favorable opinion, if there be a suppression of facts known to the person making such recommendation and material as tending to contradict the opinion, will amount to a fraud if made with intent to deceive and the person relying upon them is injured.[4] So selling a note which the seller had fraudulently procured to be indorsed by a minor is an implied assertion of the liability of such indorser that he is a person who could bind himself. Any person buying the note in reliance upon that indorsement may have an action on the case for the injury he sustains from the falsity of such representation.[5] An action lies for selling land which has no existence,[6] and for unlawfully assuming authority to sell land.[7]

[1] Paddock v. Strobridge, 29 Vt. 470; Brown v. Gray, 6 Jones, 103, 72 Am. Dec. 563; Wainscott v. Occidental Building & Loan Ass'n, 98 Cal. 253, 33 Pac. Rep. 88; Antle v. Sexton, 137 Ill. 410, 27 N. E. Rep. 691; Hecht v. Metzler, 14 Utah, 408, 48 Pac. Rep. 37, 60 Am. St. 906; Loewer v. Harris, 57 Fed. Rep. 368, 6 C. C. A. 394; Leonard v. Springer, 197 Ill. 532, 64 N. E. Rep. 299. See Paul v. Hadley, 23 Barb. 521.

[2] 14 Barb. 66, 72.

[3] Nickley v. Thomas, 22 Barb. 654; Stevens v. Fuller, 8 N. H. 463; Potter v. Taggart, 59 Wis. 1, 16 N. W. Rep. 553, 632; Manter v. Truesdale, 57 Mo. App. 435, 443; McAdams v. Cates, 24 Mo. 223. See May v. Dyer, 57 Ark. 441, 21 S. W. Rep. 1064.

[4] Eyre v. Dunsford, 1 East, 327; Ward v. Center, 3 Johns. 271; Upton v. Vail, 6 id. 181; Allen v. Addington, 7 Wend. 9; Corbett v. Gilbert, 24 Ga. 454; Viele v. Goss, 49 Barb. 96; Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. Rep. 923; Browning v. National Capital Bank, 13 D. C. App. Cas. 1.

[5] Lobdell v. Baker, 3 Met. 469, 1 id. 193, 35 Am. Dec. 358.

[6] Wardell v. Fosdick, 13 Johns. 325, 7 Am. Dec. 383.

[7] Place v. Dodge, 54 Ill. App. 167.

Fraudulent representations with reference to the amount of property belonging to either party to a proposed marriage, made by a third person for the purpose of bringing about the marriage, constitute an actionable wrong, and the usual remedy is to require the person guilty of the fraud to make his representations good.[1] One who marries a woman in the belief that she was virtuous, such belief being induced by the representations of the defendant to that effect, when, in fact, she was at the time pregnant by the defendant, may recover from him such damages as have been sustained by the loss of *consortium* to which the plaintiff as husband was entitled and of which the fraud deprived him.[2] A woman who is induced by the fraud of a married man to marry him may recover damages, and on the question as to the amount of the recovery of compensatory damages evidence is admissible to show the value of the defendant's property. The court said there were two grounds upon which such evidence was admissible: 1. It was within the rule that so far as the cause of action rests upon an injury to character or an insult to the person compensatory damages may be increased by proof of the wealth of the defendant, upon the ground that wealth is an element in man's social rank and influence, and the greater the wealth the higher the rank, and, therefore, the greater the injury or insult. 2. It was also admissible in support of the allegations in respect to the value of the plaintiff's services and the property acquired by the joint labors of herself and the defendant. The greater the wealth acquired, the greater the value of the services.[3]

It was decided long ago, in Pasley v. Freeman,[4] that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby he received damage, is the ground of an action in the nature of deceit, and that it is not necessary that the defendant should be benefited by the deceit or that he should collude with the person who received the benefit. The doctrine of this case is now universally acknowledged.[5] [584]

[1] Piper v. Hoard, 107 N. Y. 73, 76, 13 N. E. Rep. 626, 1 Am. St. 789; Montefiori v. Montefiori, 1 Wm. Black. 363.

[2] Kujek v. Goldman, 150 N. Y. 176, 44 N. E. Rep. 773, 55 Am. St. 670, 34 L. R. A. 156, 9 N. Y. Misc. 34, 29 N. Y. Supp. 294.

[3] Morrill v. Palmer, 68 Vt. 1, 14, 33 Atl. Rep. 829, 33 L. R. A. 411.

[4] 3 T. R. 51.

[5] Haycraft v. Creasy, 2 East, 92;

Where a person falsely pretending to be the agent of the injured party collected money of trespassers they were entitled to recover the money so paid.[1] All false affirmations, however, made with such intent, even though relied on and damage results, will not support an action. The representation must be as to a past or existing fact substantially or materially affecting the interests of the other party and relating to a matter as to which he may be presumed to repose confidence and is thereby in fact deceived.[2] The representation must be of facts as contradistinguished from statements of opinion or judgment. The mere affirmation or expression of opinion by a seller in regard to the property he is attempting to sell, or of a purchaser in regard to the value of the property or chose in action he desires the seller to take in payment for property he is attempting to buy, can never be safely relied on by the other party. To such affirmations the maxim *caveat emptor* applies. The party to whom they are made has no right to rely upon them, and though they are false and intended to deceive, he who confides in them is not entitled to relief.[3] If, in

Russell v. Clark, 7 Cranch, 69; Upton v. Vail, 6 Johns. 181; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Medbury v. Watson, 6 Met. 246; Ewins v. Calhoun, 7 Vt. 79; Hubbard v. Briggs, 31 N. Y. 529; De May v. Roberts, 46 Mich. 160, 9 N. W. Rep. 146, 41 Am. Rep. 154; Carpenter v. Wright, 52 Kan. 221, 34 Pac. Rep. 798.

[1] Wells v. Waterhouse, 22 Me. 131.

[2] Homer v. Perkins, 124 Mass. 431, 26 Am. Rep. 677; Hazard v. Irwin, 18 Pick. 105; Benton v. Pratt, 2 Wend. 385; Belcher v. Costello, 122 Mass. 189; Mason v. Raplee, 66 Barb. 182; Vernon v. Keys, 12 East, 632; Matlock v. Reppy, 47 Ark. 148, 14 S. W. Rep. 546.

[3] Homer v. Perkins, *supra;* Medbury v. Watson, 6 Met. 246; Manning v. Albee, 11 Allen, 520; Veasey v. Doton, 3 id. 380; Watkins v. West Wytheville Land & Imp. Co., 92 Va. 1, 22 S. E. Rep. 554; Moore v. Recek, 163 Ill. 17, 44 N. E. Rep. 868; Nostrum v. Halliday, 39 Neb. 828, 58 N. W. Rep. 429; Mayo v. Wahlgreen, 9 Colo. App. 506, 514, 50 Pac. Rep. 40; Farr v. Peterson, 91 Wis. 182; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. Rep. 219; Gustafson v. Rustemeyer, 70 Conn. 125, 39 Atl. Rep. 104, 66 Am. St. 92, 39 L. R. A. 644; Shanks v. Whitney, 66 Vt. 405, 29 Atl. Rep. 367; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166.

The rule has its limitations. It does not apply when representations are falsely made concerning the use to which the intending purchaser will put the property if it is sold to him, and such statements are made to induce its sale. Henderson v. San Antonio, etc. R. Co., 17 Tex. 580, 67 Am. Dec. 675; Greenwood v. Pierce, 58 Tex. 130.

The general rule is that representations made by a vendor to the vendee as to the cost of the property they are negotiating about, though false and made with intent to de-

connection with false representations as to the value of land offered in exchange, misrepresentations are made as to the net revenue derived from it, an action will lie.[1]

ceive, do not support an action. Hemmer v. Cooper, 8 Allen, 334; Holbrook v. Connor, 60 Me. 578; Bishop v. Small, 63 id. 12; Nœtling v. Wright, 72 Ill. 390; Sowers v. Parker, 59 Kan. 12, 51 Pac. Rep. 888.

The result is otherwise if a fiduciary relation exists between the parties or if the vendor makes a false statement concerning the cost of property he has bought upon the joint account of himself and his vendee. Hauk v. Brownell, 120 Ill. 161, 11 N. E. Rep. 416; § 1164.

Where a stock of goods was sold as a whole upon a value fixed by a private mark used by the defendant, and the plaintiff had no knowledge as to what the letters used in making that mark represented until they were inserted in the written contract, and such mark represented the selling price of the goods, instead of the wholesale price as was stated, the goods being also marked in figures at a higher price, the statement as to the significance of the letters was not one of value, but of fact, and constituted, in connection with the other facts indicated, actionable fraud. Elerick v. Reid, 54 Kan. 579, 38 Pac. Rep. 814.

The vendor of stock stated to the vendee that it was selling at a dollar a share. The statement was false, and was regarded as one of fact which would materially influence the vendee. The court said: Where the defendant knows that the plaintiff is ignorant of the value of the property and knows that he is relying upon the defendant's representation, which is in the nature of a statement of fact, the rule of *caveat emptor* does not necessarily apply. Maxted v. Fowler, 94 Mich. 106, 53 N. W. Rep. 921, citing Picard v. McCormick, 11 Mich. 68; Manning v. Albee, 11 Allen 520; Lawton v. Kittredge, 30 N. H. 500; Bradley v. Poole, 98 Mass. 169, 93 Am. Dec. 144; Miller v. Barber, 66 N. Y. 558; Gerhard v. Bates, 20 Eng. Law & Eq. 129, 22 L. J. (Q. B.) 364, 17 Jur. 1097.

When the seller makes representations as to the value of the property which, as a reasonable man, he should not have believed, and they are part of a scheme resorted to by him to induce the purchase, and the purchaser has no opportunity of examination, and is otherwise uninformed as to the value, and is inexperienced as to such matters, and relies upon them and is deceived and injured by them, they being false, he may maintain an action. Whitney v. Richards, 17 Utah, 226, 230, 53 Pac. Rep. 1122.

Statements as to the price another person was to pay for the same kind of property as was offered the plaintiff do not "fall within the class of such lying talk as dealers may indulge in with impunity." Kilgore v. Bruce, 166 Mass. 136, 44 N. E. Rep. 108. "Misrepresentations as to the price paid by a third person, or as to the selling price, have heretofore been held actionable or indictable. Manning v. Albee, 11 Allen, 520; Belcher v. Costello, 122 Mass. 189; Commonwealth v. Wood, 142 Mass. 459, 8 N. E. Rep. 432; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. Rep. 779, 36 Am. St. 701. Falsehood as to rents received

[1] Hecht v. Metzler, 14 Utah, 408, 418, 48 Pac. Rep. 37; Wise v. Fuller, 29 N. J. Eq. 257; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. Rep. 496.

§ 1167. Same subject; materiality. To entitle a party to maintain an action for deceit by means of false representations he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of a contract which will render it void, or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact substantially [585] affecting his interests, not as to matter of opinion, judgment, probability or expectation.[1] Representations made in respect to a fact to transpire in the future must be a mere promise or an opinion, and will not of themselves support an action for fraud,[2] though a party may be liable for fraud by obtaining property on promises which he never intends to fulfill.[3] Fraud cannot be predicated of misrepresentations of the law, however false they may be, whether the deception is by misrepresentation or suppression of the truth. Every person is bound to know the law.[4] This general principle is not without exceptions. "Where in the making of a contract there has been a mutual mistake, or where one knows the law and knows

is similar in principle. Brown v. Castles, 11 Cush. 348, 350. False statements as to market value may not be actionable if made to an experienced dealer in the article spoken of. Lilienthal v. Suffolk Brewing Co., 154 Mass. 185, 28 N. E. Rep. 151, 12 L. R. A. 821, 26 Am. St. 234; Graffenstein v. Epstein, 23 Kan. 443, 33 Am. Rep. 171. But it is otherwise if they are made to an unskilled person. Dawe v. Morris, 149 Mass. 188, 191," 21 N. E. Rep. 313, 14 Am. St. 404, 4 L. R. A. 158. Per Allen, J., in Kilgore v. Bruce, *supra*.

[1] Long v. Woodman, 58 Me. 49; Martin v. Eagle Development Co., 41 Ore. 448, 69 Pac. Rep. 216; State Bank v. Gates, 114 Iowa, 323, 86 N. W. Rep. 311; Warner v. Benjamin, 89 Wis. 290, 62 N. W. Rep. 179; Spence v. Geilfuss, 89 Wis. 499, 62 N. W. Rep. 529.

[2] Gallager v. Brunel, 6 Cow. 347; Markel v. Moudy, 11 Neb. 213, 7 N. W. Rep. 853; Dickinson v. Atkins, 100 Ill. App. 401.

[3] Oldham v. Bentley, 6 B. Mon. 430; Schufeldt v. Schintzler, 21 Hun, 462; Johnson v. Monell, 2 Keyes, 663; Eaton, etc. Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366; Durell v. Haley, 1 Paige, 492, 19 Am. Dec. 444; Buckley v. Artcher, 21 Barb. 585; Nichols v. Pinner, 18 N. Y. 306; Rawdon v. Blatchford, 1 Sandf. Ch. 344; Morrill v. Blackman, 42 Conn. 324.

[4] Burt v. Bowles, 69 Ind. 1.

another to be ignorant thereof fraudulently misleads him as to the legal effect of a contract, or where one who is shown to have been ignorant of the law is misled by another with whom he stands in a confidential relation, equity may give relief. In such cases he who has apparently acquired legal rights through his own fraud will not be permitted to assert them, and the misrepresentations must be made good."[1]

If the representations were of such a nature that they will bear either the interpretation that they were intended as a mere expression of opinion or as a statement of facts, the question of the actual intention must be decided by the jury.[2] But to justify a finding that they were representations of fact they must be statements susceptible of knowledge as distinguished from matters of mere belief or opinion.[3] They must relate to material facts and have been relied upon.[4] What facts are

[1] Martachowski v. Orawitz, 14 Pa. Super. Ct. 175, 183, citing Rankin v. Mortimere, 7 Watts, 372; Tyson v. Passmore, 2 Pa. 122, 44 Am. Dec. 181; Light v. Light, 21 Pa. 407; Gross v. Leber, 47 Pa. 520; Whelen's Appeal, 70 Pa. 410.

[2] Teague v. Irwin, 127 Mass. 217; Litchfield v. Hutchinson, 117 id. 195; Morse v. Shaw, 124 id. 59; American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. Rep. 1090, quoting the text; Tuscaloosa County v. Foster, 132 Ala. 392, 31 So. Rep. 587.

When representations of value are not treated as mere expressions of opinion, but of a fact, see Bacon v. Frisbie, 15 Hun, 56; Nowlin v. Snow, 40 Mich. 699; Dwight v. Chase, 3 Ill. App. 67; Medbury v. Watson, 6 Met. 246.

[3] Morse v. Shaw, Litchfield v. Hutchinson, *supra;* Safford v. Grout, 120 Mass. 20; Nounnan v. Sutter County Land Co., 81 Cal. 1, 22 Pac. Rep. 515, 6 L. R. A. 219; Williams v. McFadden, 23 Fla. 143, 1 So. Rep. 618, 11 Am. St. 345; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. Rep. 1046; Warner v. Benjamin, 89 Wis. 290, 296, 62 N. W. Rep. 179; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. Rep. 161.

An opinion falsely expressed, with intent to defraud, may, in special cases, where there is a disparity of knowledge, and the parties do not stand on a basis of equality, be actionable. See Hedin v. Minneapolis, M. & S. Inst., 62 Minn. 146, 64 N. W. Rep. 158, 54 Am. St. 628, 35 L. R. A. 417; Vilett v. Moler, 82 Minn. 12, 84 N. W. Rep. 452.

[4] Dobell v. Stevens, 3 B. & C. 623; Bower v. Fenn, 90 Pa. 359, 35 Am. Rep. 662; Markel v. Moudy, 11 Neb. 213, 7 N. W. Rep. 853; McAleer v. Horsey, 35 Md. 439; Stafford v. Maus, 38 Iowa, 133; Crosland v. Hall, 33 N. J. Eq. 111; Stout v. Merrill, 35 Iowa, 47; Matlock v. Reppy, 47 Ark. 148, 165, 14 S. W. Rep. 546; Enfield v. Colburn, 63 N. H. 218; Dady v. Condit, 163 Ill. 511, 515, 45 N. E. Rep. 224; Wimer v. Smith, 22 Ore. 469, 30 Pac. Rep. 416; Upton v. Levy, 39 Neb. 331, 58 N. W. Rep. 95; American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. Rep. 1090; Dorr v. Cory, 108 Iowa, 725, 78 N. W. Rep. 682.

material is matter of law. A misrepresentation of such facts may induce a party to enter into a contract when he would not have entered into it at all if he had known the truth; or the falsehood may have had the effect of enhancing the price, or subjecting him to some specific loss on some detail of the transaction. The nature and effect of the representations in these aspects will be important on the question of damages.[1] [586] It is not necessary that they be the sole inducements to the act of the injured party from which the injury arises.[2] "It is enough to entitle a plaintiff to recover if the false representation complained of was a material inducement to the contract or transaction which occasioned the injury, although there may have been other co-operating inducements."[3] It has been held in Nevada that where misrepresentations made by a seller are shown to be material and false it is for him to prove that the buyer did not rely upon them and that without them the purchase would have been made.[4]

§ 1168. Same subject; reliance upon representations. It is a question of some importance in all such cases whether the injured party was negligent in not availing himself of other means of information and whether he exercised due caution in acting upon the representations, and this is generally for the jury.[5] If the facts are unknown to him and he has not equal means of knowing the truth there is no legal duty not to rely on the statements of the other party.[6] Where the representa-

[1] Crater v. Binninger, 33 N. J. L. 513, quoted from in § 1165; Shaw v. Gilbert, *infra*.

[2] Shaw v. Stine, 8 Bosw. 157; Hubbard v. Weare, 79 Iowa, 678, 696, 44 N. W. Rep. 915; Dashiel v. Harshman, 113 Iowa, 283, 85 N. W. Rep. 85; Handy v. Waldron, 19 R. I. 618, 35 Atl. Rep. 884.

[3] Sioux Nat. Bank v. Norfolk State Bank, 56 Fed. Rep. 139, 5 C. C. A. 448; Safford v. Grout, 120 Mass. 20; Matthews v. Bliss, 22 Pick. 48; Cooley on Torts (2d ed.), 587; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. Rep. 188.

[4] Fishback v. Miller, 15 Nev. 428.

[5] Roberts v. Plaisted, 63 Me. 335; Savage v. Stevens, 126 Mass. 207; Greene v. Hallenback, 24 Hun, 116; Handy v. Waldron, 19 R. I. 618, 35 Atl. Rep. 884; Brady v. Finn, 162 Mass. 260, 38 N. E. Rep. 506.

[6] Id.; Tyner v. Cotter, 67 Wis. 482, 30 N. W. Rep. 782; Johnson v. Gavitt, 114 Iowa, 183, 86 N. W. Rep. 256; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. Rep. 496; Daiker v. Strelinger, 28 App. Div. 220, 50 N. Y. Supp. 1074; Stewart v. Wyoming Cattle Co., 128 U. S. 383, 9 Sup. Ct. Rep. 101; Tacoma v. Tacoma Light & Water Co., 17 Wash. 458, 473, 50 Pac. Rep. 55; Olcott v. Bolton, 50 Neb. 779, 70 N. W. Rep. 366; Norman v. Harrington, 118 Mich. 623, 77 N. W. Rep. 242; Krause v. Busacker, 105 Wis. 350, 81

tions related to the size and location of lots which were the subject of negotiation it was held that the plaintiff could not be charged with negligence for relying on them instead of consulting the recorded plat.[1] In Illinois it was held that where the land relative to which the representations were made was only six miles away the plaintiff had a right to rely on them;[2] and so in Massachusetts where the matters were peculiarly, though not exclusively, within the knowledge of the defendant.[3] The purchaser of an interest in goods has the right to rely on the seller's representations that he is the owner; and he is not negligent if he fails to test their correctness.[4] The court say: "We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood."[5] But this rule has no application if the means of knowledge are at hand. "Where means of knowledge are at hand and equally available to both parties, and the subject of the purchase is equally open to their inspection, if the purchaser does not avail himself of those means and opportunities he will not be heard to say, in impeachment of the contract of sale, that he was drawn into it by the vendor's misrepresentations."[6] Constructive notice by the record

N. W. Rep. 406; Van Velsor v. Seeberger, 59 Ill. App. 322; Rothmiller v. Stein, 9 N. Y. Misc. 167, 29 N. Y. Supp. 707; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. Rep. 1066, 37 L. R. A. 593, citing many cases; Roberts v. Holliday, 10 S. D. 576, 74 N. W. Rep. 1034; Gunther v. Ullrich, 82 Wis. 222, 52 N. W. Rep. 88, 33 Am. St. 32; Chase v. Rusk, 90 Mo. App. 25.

[1] Porter v. Fletcher, 25 Minn. 493; Hoock v. Bowman, 42 Neb. 80, 60 N. W. Rep. 389, 47 Am. St. 691.

Mere knowledge of the boundaries of a tract of land which was irregular in shape does not relieve the defendant from responsibility for his false and fraudulent representations in reference to its area if that could only be ascertained by actual survey. Cawston v. Sturgis, 29 Ore. 331, 43 Pac. Rep. 656; Ledbetter v. Davis, 121 Ind. 119, 22 N. E. Rep. 744.

[2] Nolte v. Reichelm, 96 Ill. 425.

[3] Nowlan v. Cain, 3 Allen, 261. See Brady v. Finn, 162 Mass. 260, 38 N. E. Rep. 506.

[4] Hale v. Philbrick, 42 Iowa, 81.

[5] Bondurant v. Crawford, 22 Iowa, 40; Van Epps v. Harrison, 5 Hill, 63; Bank v. Hiatt, 58 Cal. 234; Cottrill v. Krum, 100 Mo. 397, 13 S. W. Rep. 753, 18 Am. St. 556; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. Rep. 496.

[6] Slaughter's Adm'r v. Gerson, 13 Wall. 383; Farr v. Peterson, 91 Wis. 182, 187, 64 N. W. Rep. 863; Mamlock v. Fairbanks, 46 Wis. 415, 1 N. W. Rep. 167, 32 Am. Rep. 716; Brown v. Leach, 107 Mass. 368. Compare Cottrill v. Krum, *supra*.

of a mortgage will not deprive a purchaser of the right to rely [587] on the vendor's positive statements, fraudulently made, that the property is unincumbered, nor will it prevent him from suing for the false representations.[1] These may be shown though the parties contracted in writing and concerning a matter within the statute of frauds, and the writing is silent on the subject of the representations.[2] The action will lie for false and fraudulent representations whether there is a warranty or not,[3] and though the vendor expressly refused to give a deed with covenants.[4] And damages for such fraud may be recovered whether the agreement is rescinded or not.[5]

§ 1169. Same subject; defendant's belief in representations. To constitute a basis for damages the representations must not only be false, but fraudulent. If the person making the representations which are material, and which he intends shall influence another, knows them to be false the case is clear.[6] Some question has been raised whether positive representations made without knowledge and believed to be true by the party making them will sustain an action in the nature of deceit for damages. But the doctrine which seems supported by the preponderance of authority is that if a person states as of his own knowledge material facts which are susceptible thereof to one who relies and acts upon them as true it is no defense to an action for deceit, if the representations are false,

[1] West v. Wright, 98 Ind. 335; Weber v. Weber, 47 Mich. 569, 11 N. W. Rep. 389; Carpenter v. Wright, 52 Kan. 221, 34 Pac. Rep. 798; David v. Park, 103 Mass. 501; Bristol v. Braidwood, 28 Mich. 195; Babcock v. Case, 61 Pa. 247.

[2] Nowlan v. Cain, 3 Allen, 261; Lumm v. Port Deposit, etc. Ass'n, 49 Md. 233, 33 Am. Rep. 246; Dobell v. Stevens, 3 B. & C. 623.

[3] Walton v. Jordan, 23 Ga. 420; Cravens v. Gant, 4 T. B. Mon. 126, 2 id. 117. See Van Vleet v. McLean, 23 Hun, 207.

[4] Tyner v. Cotter, 67 Wis. 482, 30 N. W. Rep. 782; Haight v. Hoyt, 19 N. Y. 464, 474.

[5] Warren v. Cole, 15 Mich. 265; Mullen v. Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349; Dayton v. Monroe, 47 Mich. 193, 10 N. W. Rep. 196; Krumm v. Beach, 25 Hun, 293, 96 N. Y. 398; Gould v. Cayuga County Nat. Bank, 86 N. Y. 75; Allaire v. Whitney, 1 Hill, 484; Whitney v. Allaire, 1 N. Y. 305; Ely v. Mumford, 47 Barb. 629; Sollund v. Johnson, 27 Minn. 455, 8 N. W. Rep. 271; Miller v. Barber, 66 N. Y. 558; Merrill v. Nightingale, 39 Wis. 237, 20 Am. Rep. 42; Gustafson v. Rustemeyer, 70 Conn. 125, 134, 39 Atl. Rep. 104, 66 Am. St. 92, 39 L. R. A. 644; Pryor v. Foster, 130 N. Y. 171, 29 N. E. Rep. 123.

[6] Page v. Bent, 2 Met. 374; Goring v. Fitzgerald, 105 Iowa, 507, 75 N. W. Rep. 358; Bank v. Byers, 139 Mo. 627, 657, 41 S. W. Rep. 325.

that the person making them believed them to be true.[1] The falsity and fraud consist in representing that he knows [588] the facts to be true of his own knowledge when he has not such knowledge.[2] The rule has been applied to an action for deceit against a bank director for falsely stating the financial condition of the corporation.[3] For false warranty an action in tort for damages will lie, and according to the general course of decision it is not necessary to allege or prove that the defendant knew the warranty to be false.[4] After full discussion and great conflict of judicial opinion the house of lords has established this rule for the English courts: A false statement made through carelessness and without reasonable

[1] Tuscaloosa County v. Foster, 132 Ala. 392, 31 So. Rep. 587; Chase v. Rusk, 90 Mo. App. 25; Live Stock Remedy Co. v. White, id. 498; West v. Wright, 98 Ind. 335; Holcomb v. Noble, 69 Mich. 396, 37 N. W. Rep. 497; Totten v. Burhans, 91 Mich. 495, 51 N. W. Rep. 1119; Bird v. Kleiner, 41 Wis. 134; Cotzhausen v. Simon, 47 id. 103, 1 N. W. Rep. 473; Bower v. Fenn, 90 Pa. 359, 35 Am. Rep. 662; Snyder v. Findley, 1 N. J. L. 48; Buford v. Caldwell, 3 Mo. 477; Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Hamilton v. Billingsley, 37 Mich. 107; Baughman v. Gould, 45 id. 481, 8 N. W. Rep. 73; Beebe v. Knapp, 28 Mich. 53; Bankhead v. Alloway, 6 Cold. 56; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Wheelden v. Lowell, 50 Me. 499; Thomas v. McCann, 4 B. Mon. 601; Boyd v. Browne, 6 Pa. 310; Lockridge v. Foster, 5 Ill. 56; Van Arsdale v. Howard, 5 Ala. 596; Munroe v. Pritchett, 16 id. 785, 50 Am. Dec. 203; Parham v. Randolph, 4 How. (Miss.) 435, 35 Am. Dec. 403; Phillips v. Jones, 12 Neb. 213, 10 N. W. Rep. 708; Bank v. Hiatt, 58 Cal. 234; Taylor v. Leith, 26 Ohio St. 428; Duff v. Williams, 85 Pa. 490; Dunn v. White, 63 Mo. 181; Wharf v. Roberts, 88 Ill. 426; McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. Rep. 606; Johnson v. Gulick, 46 Neb. 817, 65 N. W. Rep. 883, 50 Am. St. 629; Cawston v. Sturgis, 29 Ore. 331, 43 Pac. Rep. 656; Burke v. Milwaukee, etc. R. Co., 83 Wis. 410, 53 N. W. Rep. 692; Krause v. Busacker, 105 Wis. 350, 81 N. W. Rep. 406; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. Rep. 219; Browning v. National Capital Bank, 13 D. C. App. Cas. 1; Gunther v. Ullrich, 82 Wis. 222, 33 Am. St. 32, 52 N. W. Rep. 88; McCready v. Phillips, 56 Neb. 446, 452, 76 N. W. Rep. 885.

[2] Litchfield v. Hutchinson, 117 Mass. 195; Page v. Bent, 2 Met. 371; Stone v. Denny, 4 id. 151; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, id. 503; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 19, 40 Atl. Rep. 1046; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. Rep. 168, 9 Am. St. 727.

[3] Gerner v. Mosher, 58 Neb. 135, 78 N. W. Rep. 384. Two judges dissented.

[4] Williamson v. Allison, 2 East, 446; Fowler v. Abrams, 3 E. D. Smith, 1; Carter v. Glass, 44 Mich. 154, 6 N. W. Rep. 200, 38 Am. Rep. 240; Shippen v. Bowen, 122 U. S. 575, 7 Sup. Ct. Rep. 1283.

ground for believing it to be true may be evidence of fraud, but does not necessarily amount to that. If made in the honest belief that it is true it is not fraudulent and does not support an action for deceit.[1] This case and other cases in England make it clear that mere ignorance, or negligence, or stupidity on the part of the person making the representations does not constitute fraud if he intends honestly to tell the truth, although his statements, understood according to their seeming meaning, may be ever so misleading. In this particular the decisions in Massachusetts are of similar import.[2] A majority of the judges there have held that the language of a letter which is the basis of an action for deceit may be shown by the defendant not to mean what the plaintiff contends, and that the writer of it did not intend to state anything falsely.[3] In Iowa, though equity will relieve against false representations innocently made, the law will not afford relief on the ground of false and fraudulent representations unless it be shown that they were made with knowledge that they were false or under circumstances from which the existence of such knowledge will be inferred. This rule applies to the statements of officers of corporations as well as to other cases.[4] In New York the rule is that actionable deceit cannot be practiced without an actual intention to deceive. While

[1] Derry v. Peek, 14 App. Cas. 337, reversing Peek v. Derry, 37 Ch. Div. 541. The facts, stated briefly, were that a statute incorporating a tramway company provided that the carriages which should be run on the tramway might be moved by animal power, and, with the consent of the board of trade, by steam power. The defendant issued a prospectus which stated that by the statute the company had the right to use steam power instead of animals. Plaintiff took shares in reliance upon that statement. Consent to the use of steam was refused, and the company was subsequently wound up. See Angus v. Clifford, [1891] 2 Ch. 449, 38 Am. & Eng. Corp. Cas. 79; High v. Berret, 148 Pa. 261, 23 Atl. Rep. 1004; White v. Sage, 19 Ont. App. 135.

[2] Nash v. Minnesota Title Insurance & Trust Co., 163 Mass. 574, 578, 40 N. E. Rep. 1039, 47 Am. St. 489, 28 L. R. A. 753, citing Tryon v. Whitmarsh, 1 Met. 1, 35 Am. Dec. 339; Page v. Bent, 2 Met. 371; Pearson v. Howe, 1 Allen, 207; King v. Eagle Mills, 10 Allen, 548; Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221; Fisher v. Mellen, 103 Mass. 503; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. Rep. 168, 9 Am. St. 727; Holst v. Stewart, 154 Mass. 445, 28 N. E. Rep. 574.

[3] Nash v. Minnesota Title Insurance & Trust Co., *supra*. Field, C. J., and Holmes, J., dissented.

[4] Hubbard v. Weare, 79 Iowa, 678, 44 N. W. Rep. 915; Boddy v. Henry, 113 Iowa, 462, 85 N. W. Rep. 771, and cases cited.

there must be furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud.[1] In Illinois knowledge of the falsity of statements made is necessary to constitute fraud.[2] In some other states the representations must have been made with knowledge that they were false or made positively or recklessly without such knowledge.[3]

§ 1170. Same subject; representations need not be made to plaintiff. It is not necessary that the false representations be made to deceive the plaintiff in particular, nor that the deceiving party obtain for himself the benefit he intended as the result of the deception.[4] C. made a sale of what purported to be certificates of stock in an incorporated company organized for the manufacture of artificial stone. He was aided in making it by circulars, made by the defendants as the officers of the supposed company, falsely stating its incorporation, purposes and prospects. In an action brought by the purchaser against these officers for these misrepresentations, contributing to deceive the plaintiff and to induce him to make the purchase in the belief, contrary to the fact, that such company had a lawful existence, and for assuming to be and to act as the officers of a duly incorporated company and in issuing certificates of capital stock it was held that they were liable for the damages he thereby sustained though [589]

[1] Hadcock v. Osmer, 153 N. Y. 604, 608, 47 N. E. Rep. 923, citing Kountze v. Kennedy, 147 N. Y. 124, 130, 41 N. E. Rep. 414, 49 Am. St. 651, 29 L. R. A. 360; Marsh v. Falker, 40 N. Y. 562, 573; Bennett v. Judson, 21 N. Y. 238. To the same effect, Van Pub. Co. v. Westinghouse, etc. Co., 72 App. Div. 121, 76 N. Y. Supp. 340. See Kramer v. Bjerrum, 19 App. Div. 432, 46 N. Y. Supp. 496.

[2] Dickinson v. Atkins, 100 Ill. App. 401.

[3] Northwestern S. S. Co. v. Dexter Horton & Co., 29 Wash. 565, 70 Pac. Rep. 59; Martin v. Eagle Development Co., 41 Ore. 448, 69 Pac. Rep. 216.

[4] Hindman v. First Nat. Bank, 112 Fed. Rep. 931, 50 C. C. A. 623.

they had no intent to defraud him in particular. And it was held, also, that it was not necessary to show that they were interested in the sale.[1] Where a member of a firm made to a mercantile agency statements, known by him to be false, as to the capital invested in the firm business, with the intent that they should be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits with and to defraud such persons, and such statements were communicated to one who, in reliance thereon, sold goods to the firm upon credit, it was held that an action for deceit could be maintained by such vendor against the partner who made such representations.[2] Chancellor Walworth said upon this point: "It is not necessary that the defendant should have had any particular individual in view as the person who was to be defrauded." And again: "Where a party plans a deliberate fraud and furnishes the means to another to carry that plan into effect upon some one of a particular class of persons, . . . it is idle to contend that he is not answerable for the consequences because he did not know upon what particular individual of the class the fraud would be perpetrated."[3] "A representation made to one person with the intention that it shall reach the ears of another and be acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly."[4]

A corporation may sue for false representations made to its promoters, in order to induce them to proceed to its organization, with a view of making a contract with the person who made such representations.[5] Where the false and fraudulent misrepresentations consisted of published statements, reports

[1] Fenn v. Curtis, 23 Hun, 384; Hubbard v. Briggs, 31 N. Y. 518; Mead v. Mali, 15 How. Pr. 347; Cross v. Sackett, 6 Abb. Pr. 247; Scott v. Dixon, 29 L. J. (Ex.) 62.

[2] Eaton, etc. Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Bliss v. Sickles, 142 N. Y. 647, 36 N. E. Rep. 1064; Tindle v. Birkett, 171 N. Y. 520, 64 N. E. Rep. 210, 89 Am. St. 822; Mashburn v. Dannenberg, — Ga. —, 44 S. E. Rep. 97.

[3] Addington v. Allen, 11 Wend. 374; Carvill v. Jacks, 43 Ark. 454; Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. Rep. 923; Parsons v. Johnson, 28 App. Div. 1, 5, 50 N. Y. Supp. 780; Swift v. Winterbotham, L. R. 8 Q. B. 253.

[4] Henry v. Dennis, 95 Me. 24, 29, 49 Atl. Rep. 58, 85 Am. St. 365.

[5] Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 14, 40 Atl. Rep. 1046.

and advertisements made by the directors of a bank, the court said that any person who saw and relied upon them and was damaged had a right of action against the directors.[1] But this doctrine does not extend to a bank which discounts a note upon the security of shares in a bank the directors of which have published false and fraudulent statements concerning its condition, the discount being made on the faith of such statements, so as to make the bank they represented liable to the discounting bank. The reports made in this case, as in the cases of a somewhat similar nature cited elsewhere,[2] were made pursuant to the national bank statute. For that reason the court said the conclusion was irresistible that the statute, in requiring such reports as were made in the case, contemplated merely the persons who deal with the bank as a financial institution; that the reports are directed to them, and they only can recover. Dealers in the stock of the bank and holders of it as collateral are not, under the statute, privy to the reports, and, if deceived or misled by them, cannot recover against the bank.[3] Misrepresentations made to an officer concerning the deposits of an insurance company in the bank managed by the persons who made the misrepresentations, whereby such officer licenses such company to do business, does not make the bank liable to a third person who was induced to purchase shares in the company by reason of the license.[4]

§ 1171. The measure of damages; general rule. Following the principle that the recovery should be commensurate

[1] Stuart v. Bank of Staplehurst, 57 Neb. 569, 577, 78 N. W. Rep. 298, citing Merchants' Nat. Bank v. Thoms, 28 Weekly L. Bul. 164 (Cincinnati Super. Ct.); Prewitt v. Trimble, 92 Ky. 176, 17 S. W. Rep. 356, 36 Am. St. 586; Tate v. Bates, 118 N. C. 287, 24 S. E. Rep. 482, 54 Am. St. 719; Graves v. Lebanon Nat. Bank, 10 Bush, 23, 19 Am. Rep. 50; Seale v. Baker, 70 Tex. 283, 7 S. W. Rep. 742; Westervelt v. Demarest, 46 N. J. L. 37, 50 Am. Rep. 400. To the same effect is Exchange Bank v. Gaitskill, 18 Ky. L. Rep. 532, 37 S. W. Rep. 160.

[2] § 1165.

[3] Merchants' Nat. Bank v. Armstrong, 65 Fed. Rep. 932. See Peek v. Gurney, L. R. 13 Eq. 79, L. R. 6 H. of L. 377; Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. Rep. 267; First Nat. Bank v. Sowles, 46 Fed. Rep. 731.

[4] Hindman v. First Nat. Bank, 86 Fed. Rep. 1013. See case on appeal, 39 C. C. A. 1. See Wells v. Cook, 16 Ohio St. 67; Ware v. Brown, 2 Bond, 268, Fed. Cas. No. 17,170; Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. Rep. 267, 13 L. R. A. 733. Compare State v. Fox, 79 Md. 514, 527, 29 Atl. Rep. 601, 47 Am. St. 424, 24 L. R. A. 679 (stated in § 1176), and cases therein cited.

with the injury, if one is fraudulently induced to enter into a contract or pursue a course of action from which expenditures have naturally succeeded or in consequence of which he has been compelled to pay money or devote his time, these expenditures and the loss of time will be elements of damage.[1] The party guilty of the fraud is to be charged with such damages as have naturally and proximately resulted therefrom.[2] He is to make good his representations as though he had given a warranty to that effect. He is to make compensation for the [590] difference between the real state of the case and what it was represented to be. Thus, in case of sales where there is a fraudulently false representation of quantity, quality or title the measure of damages is the difference in value between

[1] Charbonnell v. Seabury, 23 R. I. 543, 51 Atl. Rep. 208; Crater v. Binninger, 33 N. J. L. 513; Suydam v. Watts, 4 McLean, 162; Carvill v. Jacks, 43 Ark. 439; Sellar v. Clelland, 2 Colo. 532; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. Rep. 39; Looff v. Lawton, 97 N. Y. 478; Pryor v. Foster, 130 id. 171, 29 N. E. Rep. 123; Peak v. Frost, 162 Mass. 298, 38 N. E. Rep. 518; Struckmeyer v. Lamb, 64 Minn. 57, 65 N. W. Rep. 930; Gibbs v. Bank of New South Wales, 4 N. S. W. L. R. (law) 266; Davis v. Davis, 97 Mich. 419, 56 N. W. Rep. 774; Nashua Savings Bank v. Burlington Electric Lighting Co., 100 Fed. Rep. 673. See § 1172.

Where the owner of lots represented to a builder who was about to contract with the purchaser of lots that they were the property of the purchaser and were not incumbered, whereas the deed had not been delivered, and when it was delivered the owner took a purchase-money mortgage, which enabled him to defeat the claim of the builder, the latter was entitled to recover the amount of his loss, and it was immaterial that such mortgage was for a less sum than the loss and that it could have been purchased by the builder. Drenning v. Wesley, 189 Pa. 160, 42 Atl. Rep. 13.

A contract of partnership was found to have been void in its inception because of the fraud of one of the partners. The award of damages included the repayment of all moneys put into the firm by the plaintiff as his portion of the capital stock and a reasonable compensation for the time he acted as a partner. He was also entitled to indemnity from all liability which might arise out of the business. Richards v. Todd, 127 Mass. 167.

But there cannot be a recovery of money expended by the purchaser in improving the property before he became aware of his vendor's fraud. Having affirmed the sale by bringing his action for damages, the expenditures were made upon his own property. The fact that the vendor became the purchaser of it at a foreclosure sale does not affect his liability for such expenditure. Krause v. Busacker, 105 Wis. 350, 354, 81 N. W. Rep. 406.

[2] Benton v. Pratt, 2 Wend. 385; American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. Rep. 1090; Stratton v. Meredith, 45 Neb. 622, 63 N. W. Rep. 927.

that which is actual and that which was represented to exist;[1] and interest, at least in the discretion of the jury, on this difference may be added.[2] No distinction is made in the application of this rule as between real and personal property.[3] If

[1] Matlock v. Reppy, 47 Ark. 148, 166, 14 S. W. Rep. 546; Herfort v. Cramer, 7 Colo. 483, 491, 4 Pac. Rep. 896; Williams v. McFadden, 23 Fla. 143, 1 So. Rep. 618, 11 Am. St. 345, quoting the text; Budlong v. Cunningham, 11 Ill. App. 28; Jackson v. Armstrong, 50 Mich. 65, 14 N. W. Rep. 702; Boddy v. Henry, 113 Iowa, 462, 85 N. W. Rep. 771; Drake v. Holbrook, 23 Ky. L. Rep. 1941, 66 S. W. Rep. 512, quoting the text; Hindman v. First Nat. Bank, 112 Fed. Rep. 931, 50 C. C. A. 623, 57 L. R. A. 108; Shaw v. Gilbert, 111 Wis. 165, 191, 86 N. W. Rep. 188, citing the text; Oehlhof v. Solomon, 73 App. Div. 329, 76 N. Y. Supp. 716; Anslyn v. Frank, 8 Mo. App. 242; Caldwell v. Henry, 76 Mo. 254, 257; Shinnabarger v. Shelton, 41 Mo. App. 147; Krumm v. Beach, 96 N. Y. 398; Vail v. Reynolds, 118 id. 297, 23 N. E. Rep. 301; Lunn v. Shermer, 93 N. C. 164; Pierce v. Tiersch, 40 Ohio St. 168; Phinney v. Hubbard, 2 Wash. Ty. 369, 8 Pac. Rep. 533; Noyes v. Blodgett, 58 N. H. 502; Estell v. Myers, 56 Miss. 800; Gunther v. Ullrich, 82 Wis. 220, 52 N. W. Rep. 88; Morse v. Hutchins, 102 Mass. 439; Miller v. Barber, 66 N. Y. 558; Russell v. Clark, 7 Cranch, 69; Sibley v. Hulbert, 15 Gray, 509; Neff v. Clute, 12 Barb. 466; Tackwell v. Lambert, 5 Cush. 23; Burpee v. Sparhawk, 97 Mass. 342; Bean v. Wells, 28 Barb. 465; Rheem v. Naugatuck Wheel Co., 33 Pa. 356; Platt v. Brown, 30 Conn. 336; Quimby v. Carter, 20 Me. 218; Kidney v. Stoddard, 7 Met. 252; Briggs v. Brushaber, 43 Mich. 330, 38 Am. Rep. 187; Kendall v. Wilson, 41 Vt. 567; Ferris v. Comstock, 33 Conn. 513; Crosland v. Hall, 33 N. J. Eq. 111; White v. Smith, 54 Iowa, 233, 6 N. W. Rep. 284; Mason v. Raplee, 65 Barb. 180; Clark v. Baird, 9 N. Y. 183; Clare v. Maynard, 7 C. & P. 743; Ives v. Carter, 24 Conn. 392; Campbell v. Hillman, 15 B. Mon. 508, 61 Am. Dec. 195; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172, 40 N. H. 47; Fisk v. Hicks, 31 id. 535; Carr v. Moore, 41 id. 131; Stiles v. White, 11 Met. 356, 45 Am. Dec. 214; Sollund v. Johnson, 27 Minn. 455, 8 N. W. Rep. 271; Wright v. Roach, 57 Me. 600; Hiner v. Richter, 51 Ill. 299; Page v. Wells, 37 Mich. 415; Hamilton v. Billingsley, id. 107; Parker v. Walker, 12 Rich. 138; Foster v. Kennedy, 38 Ala. 359, 81 Am. Dec. 56; Gaulden v. Shehee, 24 Ga. 438; Warren v. Cole, 15 Mich. 265; Brown v. Woods, 3 Cold. 183; Ahrens v.

[2] Wright v. Roach, 57 Me. 600; Morse v. Hutchins, 102 Mass. 439; Budlong v. Cunningham, 11 Ill. App. 28; Snow v. Nowlin, 43 Mich. 383, 5 N. W. Rep. 443; Shaw v. Gilbert, 111 Wis. 165, 195, 86 N. W. Rep. 188; Morton v. Parker, 17 Ohio Ct. Ct. 715. See § 354.

One who is fraudulently deprived of his money is entitled to interest from the time he was induced to part with it. Atlantic Bank v. Harris, 118 Mass. 147.

If money is held to pay for property which the defendant unauthorizedly assumed to sell the interest recoverable cannot exceed the legal rate. Place v. Dodge, 54 Ill. App. 167.

[3] Gustafson v. Rustemeyer, 70 Conn. 125, 136, 39 Atl. Rep. 104, 66 Am. St. 92, 39 L. R. A. 644, citing the text; Antle v. Sexton, 137 Ill. 410, 27 N. E. Rep. 691.

the latter is the subject of the action its value is to be ascertained as of the time and place of the transaction;[1] but proof of the market value of real estate need not be confined to the day on which it was transferred; proof of value within a reasonable time before and after that event may be received.[2] One who has been fraudulently induced to sell goods to an insolvent may recover their fair value, including an ordinary measure of trade profit. Neither accounts for goods so sold nor notes given upon settlements thereof are material prior to the time when the vendor could demand payment. If the vendee is a corporation the vendor's claim against it upon its settlement of its affairs under an assignment for the benefit of creditors should be regarded in fixing the damages, as should the liability of responsible stockholders to whom stock has

Adler, 33 Cal. 608; Monell v. Colden, 13 Johns. 395, 7 Am. Dec. 390; Davis v. Elliott, 15 Gray, 90; Gustafson v. Rustemeyer, 70 Conn. 125, 137, 39 Atl. Rep. 104, 66 Am. St. 92, 39 L. R. A. 644, citing the text; Nysewander v. Lowman, 124 Ind. 584, 24 N. E. Rep. 355; Antle v. Sexton, 137 Ill. 410, 27 N. E. Rep. 691; Van Velsor v. Seeberger, 59 Ill. App. 322; Vivian v. Allen, 9 Colo. App. 147, 47 Pac. Rep. 844; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. Rep. 496; Exchange Bank v. Gaitskill, 18 Ky. L. Rep. 532; Hoock v. Bowman, 42 Neb. 80, 60 N. W. Rep. 389, 47 Am. St. 691; Parsons v. Johnson, 28 App. Div. 1, 50 N. Y. Supp. 780; King v. Mott, 37 App. Div. 124, 56 N. Y. Supp. 213; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 226, 59 N. W. Rep. 1066, 37 L. R. A. 593, citing the text; Linerode v. Rasmussen, 63 Ohio St. 545, 59 N. E. Rep. 220; Martachowski v. Orawitz, 14 Pa. Super. Ct. 175; Beasley v. Swinton, 46 S. C. 426, 473, 24 S. E. Rep. 313; McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. Rep. 606 (compare Pruitt v. Jones, 14 Tex. Civ. App. 84, 36 S. W. Rep. 502); Hecht v. Metzler, 14 Utah, 408, 419, 48 Pac. Rep. 37, 60 Am. St. 906, quoting the text; Tacoma v. Tacoma Light & W. Co. 17 Wash. 458, 482, 50 Pac. Rep. 55; Kobiter v. Albrecht, 82 Wis. 58, 51 N. W. Rep. 1124; Potter v. Necedah Lumber Co., 105 Wis. 25, 30, 80 N. W. Rep. 88; May v. Dyer, 57 Ark. 441, 21 S. W. Rep. 1064; Warner v. Benjamin, 89 Wis. 290, 62 N. W. Rep. 179, citing the text; Bank v. Byers, 139 Mo. 627, 659, 41 S. W. Rep. 325; Augur v. Smith, 90 Tenn. 729, 18 S. W. Rep. 398; Shanks v. Whitney, 66 Vt. 405, 29 Atl. Rep. 367; Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 581, 40 N. E. Rep. 1039, 47 Am. St. 489, 28 L. R. A. 753. See Rice v. White, 4 Leigh, 474.

[1] Wynn v. Longley, 31 Ill. App. 516; Connor v. Levinson, 115 Mich. 297, 73 N. W. Rep. 232.

[2] Constant v. Lehman, 52 Kan. 227, 34 Pac. Rep. 745.

A plea in an action to recover damages for fraud in the sale of land which alleges that the land was worth less when the plea was filed is not good. The damages must be fixed as of the date of the contract. Tyson v. Williamson, 96 Va. 636, 32 S. E. Rep. 42.

been issued without consideration, including interest on the face value of such stock.[1] It is not a material objection to the application of the rule in case of a recovery for fraud in selling securities that they have been assigned to a third person.[2] If the defrauded purchaser has paid part of the consideration he is entitled to a deduction equal thereto; if he has given his note in part payment and it is not shown that it has been paid, it will be presumed to have been accepted as payment.[3] Appreciation or depreciation in the value of the property is not an element of damage under this rule because the claim therefor rests upon the assumption that the party asking compensation would have sold when he could have realized the highest price.[4] In Arkansas the defrauded party may elect to recover the difference between the actual value of the property and the price paid for it, or the value placed upon it in the transaction.[5] If the parties in making an exchange of property have fixed the value of that transferred by the plaintiff, in the absence of any claim of fraud or mistake in doing so, such value will be accepted as the actual value of it.[6] The cases in which defrauded vendors have sought compensation for their wrongs are, as was said by Marshall, J., few in number. That able judge reached the conclusion, in which he was sustained by the distinguished court of which he is a member, that the same rule of damages applies in such case as where the vendee seeks redress by way of damages: the difference between the

[1] Shaw v. Gilbert, 111 Wis. 165, 86 N. W. Rep. 188; McConnel v. Wright, [1903] 1 Ch. 546, 555.

[2] Miller v. Zeimer, 12 Daly, 126.

[3] Johnson v. Culver, 116 Ind. 278, 19 N. E. Rep. 129. See West Florida Land Co. v. Studebaker, 37 Fla. 28, 19 So. Rep. 176.

An action to recover the damages resulting from fraud in obtaining goods by false representations may be brought before the maturity of a note received in payment of the goods, and the value of the latter may be recovered if it is shown that the note has not been paid and its return is proffered. The decision is rested upon the theory that a cause of action for at least nominal damages arose immediately upon the perpetration of the fraud, and that cause of action was not affected by accepting the note; but the fraud abrogated the credit evidenced thereby. Thomas v. Dickinson, 67 Hun, 350, 22 N. Y. Supp. 260.

[4] Marvin v. Prentice, 94 N. Y. 295; Brisbane v. Pomeroy, 13 Daly, 358; Shaw v. Gilbert, 111 Wis. 165, 191, 86 N. W. Rep. 188, citing the text; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. Rep. 39; McConnell v. Wright, [1903] 1 Ch. 546, 554.

[5] Matlock v. Reppy, 47 Ark. 148, 166, 14 S. W. Rep. 546.

[6] Parsons v. Johnson, 28 App. Div. 1, 50 N. Y. Supp. 780.

real value of the subject of the sale and what the value would have been had the representations been true, with interest in a proper case.[1] In vindication of that rule the judge said: The rule of difference between the value as represented and the actual value is not universal. In many jurisdictions a less rigorous rule prevails. It can only be defended on the theory that both values are determinable to a reasonable certainty and that the difference between them is attributable to the natural and proximate result of the fraud. When we try to determine the actual value of property, taking as the standard to measure from some fictitious value, it would seem that we at once begin to wander beyond the realms of natural and proximate result and to establish a new rule difficult of application and not necessary or practical in the administration of justice.

For fraudulently inducing a person to purchase the note of an insolvent as good he is entitled to recover the full amount payable by its terms.[2] One who fraudulently places in circulation the negotiable instrument of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same, in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the full value thereof.[3] One who has secured the payment of a judgment by falsely representing that he owns it may be called upon to refund though the judgment remains unpaid. "If the judgment creditor saw fit not to enforce his claim it would not afford any ground for defendant keeping what he had wrongfully obtained."[4] An unsatisfied judgment in *assumpsit* for money loaned does not bar an action on the case for deceit in procuring the loan; but the value of such judgment should be considered in assessing the damages in the

[1] Potter v. Necedah Lumber Co., 105 Wis. 25, 30, 80 N. W. Rep. 88, citing Burns v. Mahannah, 39 Kan. 87, 17 Pac. Rep. 319; Bench v. Sheldon, 14 Barb. 66.

[2] Sibley v. Hulbert, 15 Gray, 509; Neff v. Clute, 12 Barb. 466; Slingerland v. Bennett, 65 N. Y. 611. See Clayton v. O'Connor, 35 Ga. 193.

The recovery against the directors of an insolvent bank for false representations which induced the plaintiff to deposit money therein which he lost is measured by the amount deposited with interest thereon, less the value of his claim after the bank's failure. Baker v. Ashe, 80 Tex. 356, 16 S. W. Rep. 36.

[3] Metropolitan E. R. Co. v. Kneeland, 120 N. Y. 134, 24 N. E. Rep. 381, 8 L. R. A. 253, 47 Am. St. 619; Jones v. Crawford, 107 Ga. 318, 33 S. E. Rep. 51.

[4] Goring v. Fitzgerald, 105 Iowa, 507, 75 N. W. Rep. 358.

tort action.[1] One who is induced to buy a mortgage by fraudulent representations as to the value of the property covered by it and the responsibility of the indorsers of the notes thereby secured may recover the difference between the actual value of the securities and their value as represented. But in such a case more definite and specific instructions might be given: "The rule would mean a sum equal to that portion of the mortgage debt which the securities, when properly applied thereto, will fail to pay, on the hypothesis that, if they had been as represented, they were adequate to pay the whole debt. If the securities had been already foreclosed and applied, evidence of that fact would be pertinent and cogent to establish the actual amount of damage."[2] The vendor of a leasehold interest who induces the landlord to take possession of land on the representation that it was included in the lease is liable for its rental value for the unexpired term.[3]

In an action for damages for false representations it appeared that the defendant had sold the plaintiff a lot, knowing that he intended to build a dwelling-house upon it, and had falsely represented that there was a street upon the north side of the lot; that the latter, after purchasing, erected on it a valuable house for a residence, relying upon such representations. It was held that the plaintiff was entitled to recover as special damages, in addition to the difference in the value of the lot, the difference in the market value of the house as a residence with a street as represented and without such street, it appearing that the public records did not show the condition of the property with respect to streets.[4] A purchase was made of land lying near the city of Albany for the declared purpose of laying it out into building lots, and the vendor fraudu- [591] lently represented it to be even and requiring no grading. The property was not adapted by location for the purpose the vendor bought it, but not having rescinded the contract of purchase

[1] Whittier v. Collins, 15 R. I. 90, 23 Atl. Rep. 47, 2 Am. St. 879; Merchants' Nat. Bank v. Taylor, 66 Vt. 574, 29 Atl. Rep. 1012.

[2] Beetle v. Anderson, 98 Wis. 5, 10, 73 N. W. Rep. 560, citing Foster v. Taggart, 54 Wis. 391, 11 N. W. Rep. 793. See May v. Dyer, 57 Ark. 441, 21 S. W. Rep. 1064.

[3] Lewis v. Richardson, 2 Ind. Ty. 341, 59 S. W. Rep. 969.

[4] White v. Smith, 54 Iowa, 233, 6 N. W. Rep. 284.

on the ground of fraud, the court held that he was entitled to recoup damages.[1]

Where one, with intent to cheat and defraud another, induces him by fraudulent means and representations to purchase for value stock which he knows to be worthless he is liable for the damages sustained, whether the purchase is made from him or from another. The measure is the difference between the value of the stock as the condition of the company issuing it really was and what it would be if its condition had been as the purchaser was fraudulently induced to believe it to be.[2] The market price of the stock about the time of or soon after the purchase is strong evidence of its value,[3] and in the absence of other proof will control. But where the real pecuniary condition of the company is shown and it appears that the stock was worthless, such market price is entitled to no weight upon the question of value. The purchaser after discovery of its worthlessness is not bound to mitigate the loss by himself cheating some other ignorant purchaser.[4] Where that measure of redress is obtained the plaintiff cannot also recover assessments paid on the stock, except so far as they were made necessary in consequence of the particular representation or representations which made the defendant liable.[5] If the misrepresentation consists of a statement that the corporation whose stock was sold had acquired a valuable property, the

[1] Van Epps v. Harrison, 5 Hill, 63. On the question of damages the court say: "The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site of a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes had the plaintiff's representations concerning the surface been true. One mode of arriving at the correct result, and perhaps the only one, would be to inquire into the probable expense of reducing and conforming the surface of the ground to a condition corresponding with the plaintiff's representation. This would, I think, give the correct rule of damages." Dinwiddie v. Stone, 21 Ky. L. Rep. 584, 52 S. W. Rep. 814.

[2] Drake v. Holbrook, 23 Ky. L. Rep. 1941, 66 S. W. Rep. 512, quoting the text.

[3] Warner v. Benjamin, 89 Wis. 290, 295, 62 N. W. Rep. 179, citing the text.

[4] Hubbell v. Meigs, 50 N. Y. 480; Hindman v. First Nat. Bank, 112 Fed. Rep. 931, 50 C. C. A. 623, 57 L. R. A. 108; McConnel v. Wright, [1903] 1 Ch. 546. See Redding v. Godwin, 44 Minn. 355, 46 N. W. Rep. 563.

[5] Bowman v. Parker, 40 Vt. 410.

fact that it obtained it soon afterward does not defeat the action for damages unless it be shown that at the date of the sale there was but slight risk that the property would not be secured.[1] A joint-stock company which issues certificates of shares under a forged transfer is liable to their owner to the extent of their value at the time it first refuses to recognize him as a shareholder, with interest from that time.[2] The same rule applies where a corporate officer unauthorizedly issues its stock.[3] In an action by a corporation against the person to whom it had issued a new certificate of stock in reliance upon a forged power of attorney authorizing the transfer of it to him the damages included the costs and expenses (except counsel fees) of a suit against the plaintiff in this action by the rightful owner of the certificate to compel the issue of new stock to replace that so transferred, the defendant in this action having failed to defend that, as he was requested to do; the amount paid by the plaintiff for stock bought in good faith to replace that transferred, including the advance in price over that prevailing when the forgery was perpetrated, also the dividends upon the stock which were necessarily paid to its rightful owner.[4] Where a stockholder was offered a cash price for his shares and another price contingent upon the year's dividends amounting to a stated sum and took the latter in reliance upon the statements of the company's officers as to its financial condition, such officers were liable for the loss sustained by the plaintiff in accepting the contingent offer, the corporation being insolvent at the time the officers made the false representations.[5]

One who has accepted bonds because of false representations as to the title of real estate upon which the bonds were issued is not prevented from recovering damages according to the general rule, i. e. on the basis of the difference between the

[1] McConnel v. Wright, *supra*.

[2] In re Bahia & San Francisco R. Co., L. R. 3 Q. B. 583.

[3] Allen v. South Boston R. Co., 150 Mass. 200, 22 N. E. Rep. 917, 15 Am. St. 185, 5 L. R. A. 716; New York, etc. R. Co. v. Schuyler, 34 N. Y. 30; Fifth Avenue Bank v. Forty-second Street, etc. F. R. Co., 137 N. Y. 231, 33 N. E. Rep. 378, 33 Am. St. 712; Archer v. Dunham, 89 Hun, 387, 35 N. Y. Supp. 387, *nomine* Murphy v. Braker.

[4] Boston & A. R. Co. v. Richardson, 135 Mass. 473.

[5] Rothmiller v. Stein, 9 N. Y. Misc. 167, 29 N. Y. Supp. 707.

real state of the case and what it was represented to be, because the defendant has procured an assignment of the mortgage on the real estate and tendered a discharge of it to the plaintiff. The court observed: The defendant may hold and use its mortgage in any lawful way, but the plaintiffs ought not to be compelled to receive the discharge of it in mitigation of their damages after the expiration of so long a time. If the mortgage were discharged it would not, as matter of law, limit the recovery to nominal damages. If there had been no incumbrance he might long ago have sold the bonds on better terms than can be obtained now. Moreover, the commission of the fraud, if fraud is proved, was a wilful wrong, and the case is analogous to a wilful conversion of property, and an offer to return it in mitigation of damages after its condition has changed and its value has depreciated.[1]

§ 1172. Same subject; another rule. Some courts, including the supreme court of the United States and the house of lords of England, hold that the damages between a defrauded purchaser and the defrauding vendor is the difference between [592] the real value and the amount which the former was induced to pay.[2] Thus, in a late case in the federal supreme court, the action being in the nature of one on the case to recover damages suffered by reason of the purchase of stock in reliance on the defendant's false and fraudulent representations, the recovery was limited to the loss sustained, such as the money paid, interest thereon, and other outlays resulting from

[1] Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 583, 40 N. E. Rep. 1039, 47 Am. St. 489, 28 L. R. A. 753.

[2] Redding v. Godwin, 44 Minn. 355, 46 N. W. Rep. 563; Markel v. Moudy, 11 Neb. 213, 7 N. W. Rep. 853; Greenwood v. Pierce, 58 Tex. 130; Atwater v. Whiteman, 41 Fed. Rep. 427; Glaspell v. Northern Pacific R. Co., 43 id. 900 (applying the rule to the Dakota code which declares that the measure of damages for the breach of an obligation not arising from contract, except where otherwise provided, is the amount which will compensate for all the detriment proximately caused thereby); Arkwright v. Newbold, 17 Ch. Div. 301; Davidson v. Tulloch, 3 Macq. 783; Twycross v. Grant, 2 C. P. Div. 469, 544; Clayton v. O'Conner, 35 Ga. 193; Hallam v. Todhunter, 24 Iowa, 166; Hiner v. Richter, 51 Ill. 299; Pryor v. Foster, 130 N. Y. 171, 29 N. E. Rep. 123; Constant v. Lehman, 52 Kan. 227, 34 Pac. Rep. 745; Wallace v. Hallowell, 56 Minn. 501, 58 N. W. Rep. 292; Cawston v. Sturgis, 29 Ore. 331, 43 Pac. Rep. 656; Roberts v. Holliday, 10 S. D. 576, 74 N. W. Rep. 1034.

the wrong.[1] In the noted case of Peek v. Derry,[2] which, though reversed as to the question of fraud,[3] is apparently unaffected by such reversal as to the rule of damages, it was held that the value of shares of stock purchased under fraudulent representations should be ascertained immediately after they were procured.[4] If the company which issued them was a good one at that time and the stock had an intrinsic value, no fact subsequently occurring, otherwise than from intrinsic defects in the company, should increase the liability of its directors. But subsequent events, if they show that the company was worthless, may be considered in determining the value of the stock immediately after the shares were sold. In other words, the real, and not the market, value controls in fixing the recovery. If the fraud does not extend to the whole property sold the complaining vendee whose title to a portion of it has failed may recover accordingly.[5] Where the fraud is practiced by the promoters of a corporation the value of the stock sold is not uniformly fixed as of the time of the sale, especially if the purchase was made as an investment. The fraud, in such a case, has been considered operative until the purchaser learned of it; that is regarded as the time when his cause of action arose.[6] A subsequent lienholder who has been deprived of

[1] Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. Rep. 39, approved in Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. Rep. 34. The same doctrine has been applied in various federal courts. Atwater v. Whiteman, 41 Fed. Rep. 427; Glaspell v. Northern Pacific R. Co., 43 id. 900; The Normannia, 62 id. 469, 481; Wilson v. New United States Cattle Ranch Co., 73 id. 994; Rockefeller v. Merritt, 76 id. 909, 22 C. C. A. 608, 35 L. R. A. 633; Nashua Savings Bank v. Burlington Electric Lighting Co., 100 Fed. Rep. 673. And in England, McConnel v. Wright, [1903] 1 Ch. 546.

Harlan, J., said in Sigafus v. Porter, *supra:* Substantially the same rule announced in Smith v. Bolles has been applied in the following cases in state courts: Reynolds v. Franklin, 44 Minn. 30, 46 N. W. Rep. 139, 20 Am. St. 540; Redding v. Godwin, Wallace v. Hollowell, Greenwood v. Pierce, *supra;* Woolenslagle v. Runals, 76 Mich. 545, 553, 43 N. W. Rep. 454; Buschman v. Codd, 52 Md. 202, 209; Howes v. Axtell, 74 Iowa, 400, 37 N. W. Rep. 974; High v. Berret, 148 Pa. 261, 23 Atl. Rep. 1004. See Connors v. Chingren, 111 Iowa, 451, 82 N. W. Rep. 953; Wallace v. Hollowell, 56 Minn. 501, 507, 58 N. W. Rep. 292.

[2] 37 Ch. Div. 541. Johnstone v. Hall, 10 Manitoba, 161, is to the same effect.

[3] Derry v. Peek, 14 App. Cas. 337.

[4] Davidson v. Tulloch, 3 Macq. 790; McConnel v. Wright, [1903] 1 Ch. 546.

[5] Reynolds v. Franklin, 44 Minn. 30, 46 N. W. Rep. 139, 20 Am. St. 540.

[6] Goodwin v. Wilbur, 104 Ill. App. 45; Smith v. Duffy, 57 N. J. L. 679, 32 Atl. Rep. 371.

his right to collect his debt by redemption by the interposition of the liens of fraudulent and simulated securities may recover the amount of his debt and expenses necessarily incurred. "The court will not consider the speculative or extra value of the land beyond this, or allow him the benefit of his bargain in addition to the recovery of his debt."[1]

The general rule above stated is based on the assumption that the amount paid is the measure of the value as fixed by the parties; but a purchaser does not buy to sell again at the same price; and to compel him arbitrarily to accept compensation by that standard is to deprive him of such benefit of his purchase as the state of the market would have enabled him to realize if there had been no fraud.[2] As said by Mr. Justice Gray,[3] "to allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the wrong-doer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract."[4] The amount paid is evidence of the value, but on principle and according to the general course of decision, it is not conclusive of the value as it was represented to be.[5] Where there is a failure of title on an exchange of property the damages are measured by the actual value of that

[1] Parker v. St. Martin, 53 Minn. 1, 9, 55 N. W. Rep. 43.

[2] Reggio v. Braggiotti, 7 Cush. 166, 169.

[3] Morse v. Hutchins, 102 Mass. 440.

[4] Herfort v. Cramer, 7 Colo. 483, 491, 4 Pac. Rep. 896; Krumm v. Beach, 96 N. Y. 398; Brisbane v. Pomeroy, 13 Daly, 358; Gustafson v. Rustemeyer, 70 Conn. 125, 137, 39 Atl. Rep. 104, 66 Am. St. 92, 39 L. R. A. 644, citing the text; Hicks v. Deemer, 187 Ill. 164, 170, 58 N. E. Rep. 252; King v. Mott, 37 App. Div. 124, 56 N. Y. Supp. 213; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. Rep. 1066, 37 L. R. A. 593; Martachowski v. Orawitz, 14 Pa. Super. Ct. 175, 186.

[5] Lunn v. Sherman, 93 N. C. 164; Stiles v. White, 11 Met. 356, 45 Am. Dec. 214; Cary v. Gruman, 4 Hill, 625; Fisk v. Hicks, 31 N. H. 535; Carr v. Moore, 41 id. 131; Page v. Parker, 40 id. 47, 363; Tuttle v. Brown, 4 Gray, 457, 64 Am. Dec. 80; Woodward v. Thatcher, 21 Vt. 580, 52 Am. Dec. 73; Sherwood v. Sutton, 5 Mason, 1; Muller v. Eno, 14 N. Y. 597; Drew v. Beall, 62 Ill. 164; Loder v. Kekule, 3 C. B. (N. S.) 128; Dingle v. Hare, 7 id. 145; Jones v. Clarke, 3 Q. B. 194; Gustafson v. Rustemeyer, *supra*, citing the text. See Thompson v. Sheplar, 72 Pa. 160; Rockefeller v. Merritt, 76 Fed. Rep. 909, 22 C. C. A. 608.

conveyed by the defrauded party.[1] One who accepts property with knowledge that his vendor has made false statements concerning its quality cannot recover the same damages as he might recover if he had not obtained such knowledge because he does not act on the false representation. His recovery is measured by the difference between the contract price of the property and its value in the market at the time regardless of its value to him.[2] If incumbered personalty is sold as unincumbered the defrauded party may recover the value of the property not delivered or which he lost thereafter because of the mortgage.[3] One who conveys his interest in land under the belief, caused by the defendant's fraud, that he owned only a life estate therein may recover the difference between the value of the title conveyed and the value of that which he intended to convey.[4] If the plaintiff has sold property on credit in consequence of the defendant's false representations concerning the purchaser's financial ability, he may recover its value at the time of sale, less any payment made and the value of any security given.[5]

§ 1173. Same subject; other elements of damage. The general rules stated do not embrace all the damages which a defrauded vendee may suffer. In Slingerland v. Bennett[6] the defendant induced the plaintiff to purchase as good a note against an irresponsible party. The purchaser brought suit on the note and obtained judgment, but was unable to collect it. In an action for the fraud it was held that the costs of obtaining this judgment were not proper elements of damage; they were not its proximate result or natural consequence. The correctness of this conclusion may well be doubted. If these costs were incurred judiciously and in good faith to enforce the demand as being such as it was represented to be, certainly they were the natural and probable effect of the [593] sale of a note as good against a debtor unable to pay. A

[1] Woolenslagle v. Runals, 76 Mich. 545, 43 N. W. Rep. 454; Reynolds v. Franklin, 44 Minn. 30, 46 N. W. Rep. 139, 20 Am. St. 540. Compare Shinnabarger v. Shelton, 41 Mo. App. 147.

[2] McHose v. Earnshaw, 55 Fed. Rep. 584, 5 C. C. A. 210, 35 L. R. A. 633.

[3] Brennecke v. Heald, 107 Iowa, 376, 77 N. W. Rep. 1063.

[4] Hicks v. Deemer, 187 Ill. 164, 58 N. E. Rep. 252.

[5] American Nat. Bank v. Hammond, 25 Colo. 367, 374, 55 Pac. Rep. 1090.

[6] 66 N. Y. 611.

warranty of title justifies a suit or a defense to maintain it, and if the title fails the costs and expenses are proper items of damage in an action upon the warranty.[1] So where a person falsely pretends to be the agent of the owner of property and makes a contract for the sale of it, the purchaser is entitled to recover the cost of an unsuccessful suit to enforce the contract against the supposed principal.[2] One who has been fraudulently induced to buy animals falsely represented or warranted to be sound, but having disease, may recover as damages for the fraud not only for their loss or depreciation by reason of the disease, but compensation for the trouble and expense of attempting their cure; and if in reliance upon the warranty or representation such animals have been associated with and communicated the disease to others, the loss or depreciation of the latter may also be recovered.[3] The recovery may include compensation for personal injuries and incidental expenses where they result from the ordinary use of warranted property and the warranty proves false.[4] A carrier may be liable for a passenger's loss of time and suffering resulting from misrepresentations as to the character of the passengers to be carried on a vessel.[5]

Where false representations were made as to the safety of a road over which the plaintiffs made a contract to draw freight the following instruction was sustained: "If the plaintiffs' cattle sickened and died and their sickness and death are attributable to the former presence of Texas cattle upon the same trail, you may allow to the plaintiffs the reasonable value of such cattle at the time of the loss. If plaintiffs were, from the same cause, delayed and hindered in their journey and so were put to expense in employing and boarding their servants, which they would otherwise not have incurred, you may allow

[1] §§ 84, 85, 669.

[2] § 84.

[3] Sherrod v. Langdon, 21 Iowa, 518; Marsh v. Webber, 16 Minn. 418; Wintz v. Morrison, 17 Tex. 372; Johnson v. Wallower, 18 Minn. 288; Brown v. Wood, 3 Cold. 182; Rose v. Wallace, 11 Ind. 112; Pinney v. Andrus, 41 Vt. 631.

[4] Sharon v. Mosher, 17 Barb. 518; George v. Skivington, L. R. 5 Ex. 1; Thomas v. Winchester, 6 N. Y. 397; Pryor v. Foster, 130 id. 171, 29 N. E. Rep. 123. See State v. Fox, 79 Md. 514, 527, 29 Atl. Rep. 601, 47 Am. St. 424, 24 L. R. A. 679, stated in § 1176.

[5] The Normannia, 62 Fed. Rep. 469, 482.

them for this. If, also, they expended money or transferred and exchanged other property for cattle in the Indian nation with which to continue their journey, and owing to the sparsity of settlements there or the absence of a market, the plaintiffs were under the necessity to pay for the cattle so bought more than the same were worth, and if a man of ordinary prudence would have acted as plaintiffs did, if placed in the like circumstances, then you may allow the plaintiffs for the difference between the amount so necessarily expended in the purchase of cattle and the reasonable value of such cattle at the time of the purchase thereof."[1] If property for future delivery is purchased because of false representations made by the vendor as to the quantity he will put upon the market in a given time, the diminution in the price caused by putting a much larger quantity upon the market measures the damages. The price prevailing at the time delivery is made to the purchaser is to be regarded.[2]

Where the plaintiff was induced by deceit to sell stock to a person who had secured the majority of the stock of the corporation which issued it and who was willing to buy all the remaining stock outstanding, and who did in fact buy all such stock at prices higher than the plaintiff, by reason of the deceitful representations of the defendant, was induced to sell for, the plaintiff's damages were measurable by the value of the chance to sell his stock; such damages were proximate in the sense that they were such as the wrong-doer must have contemplated as the probable consequence of his misconduct, and certain in the sense that they were not problematical.[3] If no misrepresentations are made as to the character or probable productive value of the thing sold, but the purchaser is led by fraud to give more than the vendor would have been willing to accept, rather than lose the sale, the recovery is measurable by the sum the purchaser was led to pay above that for which he could and would otherwise have got the property.[4] In an action of deceit for the breach of an express contract of warranty the damages are measured by the cost of

[1] Sellar v. Clelland, 2 Colo. 532, 550.

[2] Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. Rep. 360.

[3] Weaver v. Cone, 12 Pa. Super. Ct. 143, 156.

[4] Kilgore v. Bruce, 166 Mass. 136, 44 N. E. Rep. 108.

putting all property injured by the warranted article, including such article, in as good condition as it was in before the injury. There cannot, in addition, be a recovery of incidental damages, such as loss of profits and the like. These must be regarded as compensated for by the recovery of interest on the money expended.[1] The buyer at public auction of goods which are unmerchantable may recover the expense incurred in removing them from the place of sale.[2] A *bona fide* holder of warehouse receipts taken as security for a loan and issued in fraud under circumstances which estop the company on whose behalf they were issued from denying their validity, can recover only to the extent of his loan, with interest.[3] The purchaser of a horse which proves to be worthless may not keep it an indefinite time after discovering the fraud practiced on him and recover the expense. He is bound to act with reasonable promptness and can only recover such damages as he sustains when he so acts.[4] One who performs labor for another cannot, in an action based on the defendant's false and fraudulent representations, recover on an implied contract, the tort being waived. Hence the recovery will be limited to the amount which the defendant has been enriched by his wrong; the plaintiff cannot recover the profits he would have made on performance of the contract had there been no fraud.[5] A person who is induced by deceit to enter into a contract to perform labor for a gross sum on the representation that the number of logs to be driven is about one-third the real number is not barred of the right to recover what the work was reasonably worth because he completed his contract after discovering the fraud, the work then being in such condition that it could not be discontinued, and compensation on that basis being immediately demanded after the drive was finished.[6]

§ 1174. Same subject. In New York one who has been induced by fraudulent representations to become the purchaser of property may elect either of three remedies. He may re-

[1] Eagle City Iron Works v. Barber, 102 Pa. 156.

[2] Ruben v. Lewis, 20 N. Y. Misc. 583, 46 N. Y. Supp. 426.

[3] Corn Exchange Bank v. American Dock & Trust Co., 163 N. Y. 332, 57 N. E. Rep. 477.

[4] Dawson v. Vickery, 150 Ill. 398, 37 N. E. Rep. 910.

[5] Huganir v. Cotter, 102 Wis. 322, 78 N. W. Rep. 423.

[6] Sell v. Mississippi River Logging Co., 88 Wis. 581, 60 N. W. Rep. 1065.

scind the contract absolutely and sue at law for the consideration paid thereon, if he has restored or offered to restore to the other party whatever he has received from him by virtue of the contract.[1] He may bring an action in equity to rescind the contract and obtain full relief therein.[2] "Such an action is not founded upon a rescission, but is maintained for a rescission, and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial."[3] Or he may retain what he has received and bring an action at law to recover the damages sustained. In such an action an offer to restore the property received does not affect the damages.[4] A later case lays down the general rule that when fraud has been practiced in the sale of real estate the vendor may proceed in equity to rescind the contract by restoring or tendering to the vendee what he has paid, when he will be entitled to a decree for the reconveyance of the land, or he may proceed in affirmance of the sale and recover damages at law for the deceit. Both remedies cannot be availed of, nor can they be blended and the contract be affirmed in part and rescinded in part.[5] Generally there are at least two courses open to the injured party: he may on discovery of the fraud restore what he has received, rescind the contract and recover what he has paid or sue for damages.[6] If he affirms the contract and sues for the fraud he is not necessarily entitled to recover for all he has done or paid on it, for he may have derived some benefit therefrom.[7] But when the contract is repudiated on account of the fraud the defrauded party is entitled to be put in *statu quo*, and where this cannot be literally accomplished it may be done by damages. Thus, a defendant represented the water power con-

[1] Gould v. Cayuga County Nat. Bank, 86 N. Y. 75; Vail v. Reynolds, 118 id. 297, 23 N. E. Rep. 301; Pryor v. Foster, 130 N. Y. 171, 29 N. E. Rep. 123. The rescission must be made promptly on discovering the fraud. Strong v. Strong, 102 N. Y. 69, 5 N. E. Rep. 799, distinguished in Pryor v. Foster, *supra*.

[2] Allerton v. Allerton, 50 N. Y. 670.

[3] Vail v. Reynolds, *supra*.

[4] Id.

[5] Yeomans v. Bell, 151 N. Y. 230, 45 N. E. Rep. 552.

[6] Warren v. Cole, 15 Mich. 265; Atlanta, etc. R. Co. v. Hodnett, 29 Ga. 461; Hauk v. Brownell, 120 Ill. 161, 11 N. E. Rep. 416; Potter v. Taggart, 59 Wis. 1, 16 N. W. Rep. 553, 632.

[7] Yeomans v. Bell, 151 N. Y. 230, 45 N. E. Rep. 552.

nected with his tannery to be sufficient to work it continuously throughout the year, and the plaintiff, having no knowledge [554] of the premises and relying upon his representation, was thereby induced to purchase; thereupon, after taking a bond for it and giving his note for the price, he entered into possession and under the advice of the defendant expended large sums in repairs. The water failing, he abandoned the property and notified the defendant that he considered the contract of purchase rescinded. The defendant resumed possession and had the benefit of the repairs. And it was held that *assumpsit* would lie to recover for such repairs; that the law would under such circumstances imply a promise to pay for them.[1] Where the plaintiff was fraudulently induced to take an endowment policy of insurance and pay the premium thereon, he was entitled to recover in an action brought before the second premium became due the amount paid, the defendant having been notified of the purpose to cancel the policy. This rule of damages was not inapplicable because the company was solvent, the policy a valid one and the rate of premium fair. The rule contended for by the defendant was the difference in the money value between what plaintiff got and what he would have got had the representations been true. But this was inapplicable because the contract was ex-

[1] Farris v. Ware, 60 Me. 482.

One who obtains title by fraud cannot, on a rescission of the contract, recover for repairs or improvements made or for incumbrances removed while he was in possession. Railroad Co. v. Soutter, 13 Wall. 517; Mosely v. Miller, 13 Bush, 408. On the contrary, he is chargeable for rents during that time. Mosely v. Miller, *supra*.

It is held in Texas that there cannot be a recovery for improvements made by one who purchases property, there being fraudulent misrepresentations as to the title, unless it is shown that the purpose to improve was known to the vendor at the time of the sale. A claim for attorney's fees in prosecuting the suit to recover damages was also denied and the recovery was limited to the consideration paid and interest thereon. Haddock v. Taylor, 74 Tex. 216, 11 S. W. Rep. 1093.

But in Arkansas a purchaser who relies upon fraudulent representations made by his vendor as to the state of the title may, upon eviction by the holder of the superior title, recover the purchase-money and interest and for improvements made upon the property. He is not bound to resort to the vendor's warranty, nor restricted to the measure of recovery which an action thereon would afford. Carvill v. Jacks, 43 Ark. 439, 454. See Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229.

ecutory and was rescinded. The contention that the cancellation of the policy was the cause of the loss of the premium was considered a refinement which would lead to unjust results.[1] The plaintiff may recover, in such a case, the premiums paid, less the value, if any, of the insurance which he received; what that was, the jury should find.[2]

The right to recover the purchase-money and interest on the failure of title is not affected by the fact that the purchaser has cut timber from the land and sold it, he being liable to account to the owner of the land for it; neither is the defendant liable for the expense of such cutting so long as the plaintiff has not been compelled to respond to the owner.[3] The defrauded purchaser is not bound to purchase the outstanding title and thus mitigate the liability of his vendor.[4] For the fraud of falsely representing a third person to be worthy of credit, whereby the person deceived has been induced to sell goods to such third person, he being insolvent, the vendor is entitled to recover the value of the goods sold.[5] If a debtor fraudulently settles with his creditor for fifty per cent. of the latter's claim, the creditor being induced thereto by fraudulent representations that other creditors had made such settlements, a suit by him in *assumpsit*, while retaining the amount, is in affirmation of the contract and the balance cannot be recovered.[6] But in an action for the fraud such amount may be recovered as would have been received if no fraud had been committed.[7] One who sells his land for his own price, the only fraud practiced being the vendee's intention not to pay for it,

[1] Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25. See Nash v. Minnesota Title Insurance & Trust Co., 163 Mass. 574, 582, 40 N. E, Rep. 1039, 47 Am. St. 489, 28 L. R. A. 753.

One who is induced by fraudulent representations to take a membership in a mutual benevolent society can only recover such sum as he has expended by reason thereof; not the amount he would have received if the representations were true. May v. New York, etc. Society, 14 Daly, 389.

[2] McKindley v. Drew, 69 Vt. 210, 71 Vt. 138, 37 Atl. Rep. 285.

[3] Tyner v. Cotter, 67 Wis. 482, 30 N. W. Rep. 782.

[4] Id.

[5] Viele v. Goss, 49 Barb. 96; Bean v. Wells, 28 id. 466; Rheem v. Naugatuck Wheel Co., 33 Pa. 356.

[6] Jewett v. Petit, 4 Mich. 514; Walsh v. Sisson, 49 id. 423, 13 N. W. Rep. 802; Grabenheimer v. Blum, 63 Tex. 369.

[7] Id.; Page v. Wells, 37 Mich. 421; Bowman v. Parker, 40 Vt. 413; Foster v. Kennedy's Adm'r, 38 Ala. 359, 81 Am. Dec. 56; Moberly v. Alexander, 19 Iowa, 164; Reynolds v. Cox, 11 Ind. 266.

is not entitled to recover the difference between the value of the land and the money received; but the price agreed upon, less the sum paid and less any sum due the defendant because of the transaction and accruing under the contract, measures the recovery.[1] One who has sold goods and accepted in payment thereof the purchaser's check, payment of which he stopped, is not entitled to recover, in addition to their value, interest thereon, damages for their detention, and such damage as the jury may reasonably think he deserved.[2] The damages for conspiring to defraud by purchasing goods and disposing of them without paying therefor are measured by the value of the goods where and when they were obtained, with interest from the time they were obtained.[3] Where the grantee of land conveyed in trust by a deed absolute conveyed the same to *bona fide* purchasers the recovery was measured by the value of the land on the day of the trial less the debt secured and interest, or the money realized by the defendant on his sale, with interest, less the amount of the debt secured.[4]

A creditor who fraudulently colludes with his insolvent debtor and receives property from him in excess of the debt is liable to other creditors for the value of such property at the time it was transferred to him, and not for the sum realized from a subsequent sale of it.[5] Where a transfer of property was set aside as against the creditors of the transferrer because it was fraudulent and it appeared that prior to the transfer the property was pledged to secure a valid debt due a party not connected with the fraud, and that the fraudulent transferee received only the surplus avails of the property after deducting the amount of the debt, the recovery by the creditors was limited to the value of the property, less the amount of the debt. The property, having been sold for less than its value, the creditors were not limited to the recovery of the price received, less the lien. Because the transferee acquired the title wrongfully and sold the property for less than its value the

[1] McCready v. Phillips, 56 Neb. 446, 76 N. W. Rep. 885.

[2] Cole v. High, 173 Pa. 590, 34 Atl. Rep. 292.

[3] John V. Farwell Co. v. Wolf, 96 Wis. 10, 20, 70 N. W. Rep. 289, 65 Am. St. 22.

[4] Boothe v. Fiest, 80 Tex. 141, 15 S. W. Rep. 799; Mixon v. Miles, 92 Tex. 318, 47 S. W. Rep. 966.

[5] Oppenheimer v. Halff, 68 Tex. 409, 4 S. W. Rep. 562.

loss was his.[1] One who fraudulently procures the sale of land pursuant to a judgment must answer for its value regardless of whether he has received the purchase-money,[2] and for interest on the value at the date of the sale, not merely what the land was sold for.[3]

§ 1175. Remote and contingent damages. Only such damages are recoverable as are shown with reasonable certainty to have been sustained. Remote, contingent and conjectural losses will not be considered.[4] A vendor who seeks to set aside a contract for the sale of property because of fraud cannot recover for anxiety, worry and embarrassment resulting from the defendant's conduct, nor for expenses incurred in caring for the property sold.[5] A trustee who colludes with the remainder-man and with the tenants of the *cestui que trust*, the latter holding a life estate, and causes his ejection and loss of rents, is not responsible for losses resulting from the subsequent insolvency of the tenants.[6] One who is fraudulently led to purchase the interest of retiring partners in a firm and to execute a note in the name of the new firm for a sum in excess of the invoice price of the property received cannot recover more than such excess, although he is obliged to pay the whole amount of such note because of the subsequent insolvency of his partners.[7] For the fraud of inducing by false representation the payee of a note secured by mortgage to indorse it in blank, by means whereof it got into the hands of a *bona fide* holder, there can be no recovery until such indorser has actually paid the note; until then he will suffer no injury. The mortgage debt may be made out of the security or the maker of the note.[8] But all such liability to loss from fraud as a ground of damage is not rejected as conjectural and con-

[1] Hamilton Nat. Bank v. Halsted, 134 N. Y. 520, 31 N. E. Rep. 900, 30 Am. St. 693.

[2] Cox v. Armstrong, 14 Ky. L. Rep. 350, 20 S. W. Rep. 290.

[3] Maynard v. May, 16 Ky. L. Rep. 690, 25 S. W. Rep. 879.

[4] See The Normannia, 62 Fed. Rep. 469; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. Rep. 39; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. Rep. 34; § 1176; Jamison v. Ellsworth, 115 Iowa, 90, 87 N. W. Rep. 723.

[5] Newman v. Smith, 77 Cal. 22, 18 Pac. Rep. 791.

[6] Kaye v. Powel, 1 Ves. Jr. 403; Fox v. Mackreth, 2 Cox, 320; Franklin v. Greene, 2 Allen, 579; Squier v. Plunkett, 11 Gray, 11.

[7] Schwabacker v. Riddle, 84 Ill. 517.

[8] Freeman v. Venner, 120 Mass. 424; Alden v. Wright, 47 Minn. 225, 49 N. W. Rep. 767.

tingent. It has been held in New York[1] that if a vendor fraudulently represents goods sold to be his own, when he knows them to belong to a stranger, an action on the case lies to recover damages therefor, though the real owner has not recovered the property nor the vendee suffered any actual damage. A recovery was had on the basis of an unsatisfied liability in Kenyon v. Woodruff,[2] and upon very safe principles. The defendants by fraud induced the plaintiff innocently to take and remove and thereby convert the property of a third [595] person for their benefit. They took upon themselves the defense of an action of trover brought against him by the owner, and judgment therein was recovered, which he had abundant property to satisfy. They were held liable to him for the amount of that judgment and interest upon it, though it had not been collected or paid. The court thought that there was no analogy between the relations of these parties and those which exist between principal and surety. Graves, J., said: "The relation of principal and surety grows out of the consent of all the parties, and the principles which belong to it in regard to the right of recovery over can have no necessary application to a case where the relation does not arise by consent, but is caused by a positive wrong committed by one against another. It would be very unreasonable to hold that where one is drawn by the fraud of another to perform an act which gives a third party a right of action against him, and which has eventuated in a judgment which is indisputably collectible of him, the wrong-doer may still insist that his responsibility to the party he has by his fraud caused to be accountable to the third party is required to be governed by those rules which naturally and justly apply where one by choice assumes a relation of accountability on behalf of one to another." It has recently been ruled in New York, after a full examination of the adjudications there, that the directors of a corporation who fraudulently issue in its name and transfer to *bona fide* holders for value notes which purport to be its valid obligations are liable to the corporation as soon as its liability attaches by their transfer of the paper. Neither the right to sue the directors nor the measure of their liability is

[1] Case v. Hall, 24 Wend. 102, 35 Am. Dec. 605. [2] 33 Mich. 310.

affected by the fact that the notes remain unpaid. In the absence of evidence of circumstances diminishing its value the face of the paper measures the liability of the wrong-doer.[1]

§ 1176. Same subject. In an Iowa case[2] the defendants sold and assigned to the plaintiff for a money consideration a bond of the school fund commissioner for a deed to a tract of school land. It appeared that the interest for one year had not been paid by them, although they so represented when they assigned the bond to the plaintiff. The trial court found that the plaintiff had not paid that year's interest, but paid the defendants that amount more than was due according to their agreement and that the county held their note, which contained their obligation to pay the interest. It was ruled that the plaintiff was not entitled to recover for that interest because he had not paid it; he had not yet suffered any damage by means of the defendants' representations. The court say: "He has not yet paid the money due the school fund; nor is it alleged that the defendants are insolvent or unable to pay the same. Their note is with the proper officer and the defendants are liable to an action [596] thereon at any time. The plaintiff's recovery in this case would not prevent the school fund from suing and recovering at any time for the same interest. The defendants should not be made twice liable for the same debt." It may be observed in respect to this case that the defendants could have protected themselves from this double liability by paying the interest in question to the school fund, even after this action was brought, and therefore they were not, except by their own fraud and negligence, placed in peril of a double recovery. They having received from the plaintiff an amount equal to that interest, on their false representation that they had paid it, it would seem just that he should recover damages to an equal amount, since the defendants, on the action being brought, persisted in the wrong by defending instead of making their representation good by immediate payment to the school fund.[3]

[1] Metropolitan E. R. Co. v. Kneeland, 120 N. Y. 134, 24 N. E. Rep. 381, 17 Am. St. 619, 8 L. R. A. 253.

[2] Kimmans v. Chandler, 13 Iowa, 327.

[3] See Dunne v. Thorpe, B., D. & O. 128; Barmon v. Lithauer, 4 Keyes, 317.

In Bradley v. Fuller[1] the court held that a false and fraudulent representation by which a creditor was induced to abandon an intention to sue out an attachment against his debtor, followed by the loss of his debt in consequence of other creditors attaching all his property, is not actionable; that he, on that state of facts, had suffered no legal damage; that it must necessarily be uncertain whether he would have attached the property and applied it to the debt if the alleged representation had not been made.[2] It is not easy to perceive why the execution of such an intention might not be proved with sufficient certainty. It might almost be presumed under the circumstances stated because of the interest of the creditor to secure his debt. Readiness to perform a contract is sufficient to evince the intention of a party to fulfill it, so that if the other by any act or omission prevent its performance the former may recover damages estimated on the assumption that he would have proceeded. In Remington Sewing Machine Co. v. Kezertee,[3] where a surety was drawn into the execution of a contract by false representations or suppression of the truth, it was held that the testimony of the surety was admissible [597] that he would not have become such if he had known the facts concealed. In a late Georgia case the holder of a deed tainted with usury stated at a sheriff's sale of the land that he held an equitable mortgage on the premises for $1,500, and the purchaser would buy subject to that incumbrance. He bid in the land himself, knowing that $500 of the $1,500 secured by his deed was for one year's interest on the remaining $1,000. On evidence that another would have given $500 more for the land at the sale had the truth been told the mortgagor was held entitled to recover that sum from the buyer.[4] In Benton v. Pratt[5] it was held that where a contract would have been fulfilled but for the false and fraudulent representations of a third person an action would lie against such person for the fraud, although the contract could not have been enforced by action.[6] A creditor at large who has taken no proceedings against his debtor to acquire a lien upon

[1] 118 Mass. 239.
[2] See § 30, note, and § 965.
[3] 49 Wis. 409.
[4] Denham v. Kirkpatrick, 64 Ga. 71.
[5] 2 Wend. 385.
[6] See Parks v. Alta California Tel. Co., 13 Cal. 422, 73 Am. Dec. 589.

his property cannot maintain an action against a person who takes possession or converts the debtor's property under a conveyance or transfer which is made to hinder, delay and defraud his creditors.[1] But it is otherwise if the creditor has a lien and it is reduced in value by the fraudulent conduct of another,[2] or if its release is procured by fraud.[3] So a creditor may compel the fraudulent grantee of his debtor to account for the property after such creditor has obtained a judgment, and under it a right to resort to the equitable assets of his debtor.[4]

If the purpose of the contract of purchase and sale was to give the purchaser a privilege not purchasable in any market, and the loss of profits or advantages which must have resulted from the fulfillment of the contract must be presumed to have been stipulated for and to have been within the contemplation of the parties when the contract was made, the loss of profits is an element of the damage and may be considered in fixing the difference between the value of the rights which were represented to pass under the contract and the value of the rights which did pass under it.[5] But the purchaser of a business enterprise cannot recover the profits he would have made by transferring it to a corporation to be organized for the purpose of taking it.[6] Damages resulting to a purchaser of property through his being unable to borrow money upon as favorable terms as he would have been able to do if there had been no misrepresentation in his contract of purchase are too remote.[7] One who has purchased a lease, barroom fixtures and a liquor license, the last of which the vendor did not own, and who sold liquor thereunder, cannot recover for the consequences of his conviction and imprisonment. No damages are recoverable when the claim therefor rests on the plaintiff's violation of a penal statute.[8] One who has been induced to purchase

[1] Adler v. Fenton, 24 How. 407; Moran v. Dawes, Hopk. Ch. 365; Lamb v. Stone, 11 Pick. 527; Wellington v. Small, 3 Cush. 145; Austin v. Barrows, 41 Conn. 287.

[2] Yates v. Joyce, 11 Johns. 136.

[3] Marshall v. Buchanan, 35 Cal. 264, 95 Am. Dec. 95.

[4] Robinson v. Boyd, 17 Mich. 128.

[5] Martachowski v. Orawitz, 14 Pa. Super. Ct. 175, 186.

[6] Loewer v. Harris, 57 Fed. Rep. 368, 6 C. C. A. 394.

[7] Wilkinson v. Detmold, 16 Vict. L. R. 439. See § 1129.

[8] Martachowski v. Orawitz, 14 Pa. Super. Ct. 175. See § 5.

stock by misrepresentations cannot recover for damage to his feelings and for his disgrace in the community.[1] The existence of a lien on land purchased as free from incumbrance does not make the vendor liable for the purchaser's loss of rents which might have been received had the land been improved, though the existence of the lien deterred the making of the improvements; nor could the purchaser recover the fee paid an attorney for assisting in procuring the release of the lien, which the vendor willingly executed as soon as it could be done and which was prepared by his own attorney.[2] In a Maryland case decided in 1894[3] the defendant sold, by means of false representations, a horse affected with glanders, the purchaser being ignorant and the vendor knowing of the existence of the disease and of its dangerous character to human beings. The person put in charge of the horse by the purchaser contracted the disease and died therefrom. The court held that the vendor might, under proper pleading and proof, be responsible for the death of such person. In a late case in one of the Texas courts of civil appeals, in which a writ of error was denied by the supreme court, an undertaker who fraudulently supplied a pine box in which to place the remains of a son of the plaintiff, who had bought and paid for a coffin and robe in which to bury the deceased, which box was used though it was too small to contain the remains, was held liable for mental anguish sustained by the decedent's mother, sister and brothers.[4]

§ 1177. Expenses of litigation. It is settled in Connecticut that in actions for fraud the successful plaintiff may, in the discretion of the jury, recover, in addition to the actual damages directly resulting, such sum as will reimburse him for the expenses necessarily incurred in obtaining redress.[5] In Kansas attorneys' fees and expenses incurred in good faith by a bank in saving itself from loss occasioned by the fraud of a party who obtained from it a draft and then caused the same to be cashed may be recovered as compensatory damages.[6] In

[1] Cable v. Bowlus, 21 Ohio Ct. Ct. 53.

[2] Sherrick v. Wyland, 14 Tex. Civ. App. 299, 37 S. W. Rep. 345.

[3] State v. Fox, 79 Md. 514, 527, 29 Atl. Rep. 601, 47 Am. St. 424, 24 L. R. A. 679.

[4] Dunn v. Smith, 74 S. W. Rep. 576.

[5] Bennett v. Gibbons, 55 Conn. 450, 12 Atl. Rep. 99.

[6] First Nat. Bank v. Williams, 62 Kan. 431, 63 Pac. Rep. 744. See § 58.

Ohio the court has said that the better opinion seems to be that in cases where the act complained of is tainted by fraud or involves an ingredient of malice or insult, the jury may award proper and reasonable counsel fees in their estimate of damages.[1] One who has fraudulently induced his debtor to leave the state of his domicile and go into another state with intent to cause his arrest and compel him to pay for his release is liable for the money paid for that purpose; and if the plaintiff paid money to settle two other suits brought by others who profited by the plaintiff's arrest through the contrivance of the defendant, the latter is liable therefor.[2]

§ 1178. Exemplary damages. There is not an entire agreement among the authorities on the question whether exemplary damages may be allowed in actions for deceit; nor are the cases numerous in which the point has been considered. On the principle upon which such damages are allowed where the doctrine of punitory damages prevails, it is not easy to see how they are to be excluded as matter of law in cases of wilful and deliberate fraud followed by actual damage.[3]

§ 1179. Parties. Plaintiffs who are jointly interested in the damages sought to be recovered for fraud may join in the action.[4] Where there were two purchasers of land which the vendor fraudulently misrepresented as to quantity and location, it was held that such purchasers might join though they

[1] Roberts v. Mason, 10 Ohio St. 277, 282; Peckham Iron Co. v. Harper, 41 id. 100.

[2] Sweet v. Kimball, 166 Mass. 332, 44 N. E. Rep. 243, 55 Am. St. 406.

[3] Ch. 9; Nye v. Merriam, 35 Vt. 438; Byram v. McGuire, 3 Head, 530; Oliver v. Chapman, 15 Tex. 400; Peckham Iron Co. v. Harper, 41 Ohio St. 100; Platt v. Brown, 30 Conn. 336; Ives v. Carter, 24 id. 392; Kelly v. Valentine, 17 Ill. App. 87; Tate v. Watts, 42 id. 103; Kujek v. Goldman, 150 N. Y. 176, 179, 44 N. E. Rep. 773, 34 L. R. A. 156, 55 Am. St. 670. But see Lane v. Wilcox, 55 Barb. 615, followed in Oehlhof v. Solomon, 73 App. Div. 329, 76 N. Y. Supp. 716.

It is said in Cable v. Bowlus, 21 Ohio Ct. Ct. 53, 59, that the case must be such that it was either gross or malicious fraud, or something showing a very corrupt condition of affairs, to justify the recovery of exemplary damages. "I have never heard of a bare case of fraud where it was claimed that for fraud alone the party was entitled to punitive damages."

Actual damages must be proven or exemplary damages cannot be recovered. Dickinson v. Atkins, 100 Ill. App. 401.

[4] Medley v. Watson, 6 Met. 257-8; Stiles v. White, 11 Met. 356, 45 Am. Dec. 214; Dunn v. Smith, 74 S. W. Rep. 576 (Tex. Ct. of Civ. App.); Larsen v. Groeschel, 98 Ind. 160.

have since made partition.[1] A petition which joins several parties as defendants, if it states a joint act relating to a tort which may from its nature be joint or may be committed by persons in combination, is not subject to a demurrer on the ground of misjoinder of parties.[2]

[598] § **1180. Pleading.** Where fraud is the ground of action the plaintiff must allege all circumstances necessary for the support of the action with such certainty that the defendant may know what he is called on to answer.[3] Evidence is admissible only of the false statements alleged in the declaration.[4] A general averment of fraud in an answer is sufficient in New Jersey,[5] but not in New York.[6]

[1] Porter v. Fletcher, 25 Minn. 493. See Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141.

[2] Stuart v. Bank of Staplehurst, 57 Neb. 569, 78 N. W. Rep. 298, and cases cited.

[3] Duffy v. Byrne, 7 Mo. App. 417; First Nat. Bank v. Grosshans, 61 Neb. 575, 81 N. W. Rep. 542; Tolbert v. Caledonian Ins. Co., 101 Ga. 741, 28 S. E. Rep. 991; Johnston v. Spencer, 51 Neb. 198, 70 N. W. Rep. 982; New Bank v. Kleiner, 112 Wis. 287, 87 N. W. Rep. 1090; Schoellhamer v. Rometsch, 26 Ore. 394, 38 Pac. Rep. 344.

[4] Jackson v. Collins, 39 Mich. 557.

[5] Fivey v. Pennsylvania R. Co., 66 N. J. L. 23, 48 Atl. Rep. 553.

[6] Eccardt v. Eisenhauer, 74 App. Div. 35, 77 N. Y. Supp. 18.

CHAPTER XXXI.

INFRINGEMENT OF PATENT-RIGHTS.

§ 1181. Statutory remedies.
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§ 1181. Statutory remedies. Pecuniary redress for in- [599] fringement of patent-rights may be obtained, pursuant to the legislation of congress, by actions at law and by suits in equity. In the former, damages may be recovered in an action on the case in the name of the party interested, either as patentee, assignee[1] or grantee. And whenever in any such action a verdict is rendered for the plaintiff the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount found, together with the costs.[2] The legal remedy has been substantially the same since the passage of the act of July 4, 1836.[3] The equitable remedy was enlarged by the act of 1870. It provides that upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover,

[1] An assignee cannot sue in his own name for an infringement which occurred before the assignment was made to him, although his assignment covers all claims and demands accruing from infringements previous to the date of his assignment. Armstrong, Whitworth & Co. v. Norton, 15 D. C. App. Cas. 223. But see § 1186.

[2] Act of July 8, 1870, § 4919, R. S. of U. S.

[3] 5 Stats. at Large, 123, sec. 14.

in addition to the profits to be accounted for by the defendant, the damages sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction, and shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case.[1] By amendment, made in 1897, the recovery of profits or damages is limited to six years before the commencement of suit or action. The authority to treble the damages may be exercised by a court of equity, and includes authority to multiply or increase them to any amount less than treble the sum awarded.[2]

Under section 4900 of the revised statutes the patentee or his assignee, if he makes or sells the articles patented, cannot recover damages against infringers of the patent unless he has given notice of his right either to the whole public by marking his article "patented" or to the particular defendant by informing him of his patent and of the infringement of it. The failure to give such notice also bars the recovery of the penalty imposed by the act of February 4, 1887, ch. 105,[3] upon any person who, during the term of a patent for a design, and without the license of the owner, applies the design secured by the patent, "or any colorable imitation thereof," to any article of manufacture for the purpose of sale, or sells or exposes for sale any article of manufacture to which "such design or colorable imitation" has been applied, knowing that the same has been so applied.[4] If an infringed article is covered by two patents, and is marked "patented" by only one of them, though both patents were infringed, the accounting of damages must be had solely under the patent so marked.[5] In the absence of marking or notice neither damages nor profits can be recovered.[6]

The act of February 4, 1887, has enlarged the remedy for

[1] § 4921, R. S. of U. S.

[2] National Folding-Box & Paper Co. v. Elsas, 81 Fed. Rep. 197.

[3] 24 Stats. at Large, 387.

[4] Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. Rep. 576; Monroe v. Anderson, 58 Fed. Rep. 398, 7 C. C. A. 272.

[5] Blount Manuf. Co. v. Bardsley, 66 Fed. Rep. 761.

[6] Allen v. Deacon, 21 Fed. Rep. 122; National Co. v. Belcher, 68 Fed. Rep. 665. In B. B. Hill Manuf. Co. v. Stewart, 116 id. 927, the court seemed to favor the recovery of nominal damages under such circumstances.

the infringement of a design patent by giving the entire net profits made on the article to which the infringing design is applied, thereby changing the rule[1] which required an apportionment of the profits attributable merely to the design. Such act applied to pending suits so far as infringements occurred after it took effect.[2]

§ 1182. Same subject; judicial summary. Mr. Justice Clifford, in a comparatively late case,[3] thus summarized the legal and equitable remedies for this wrong: "Prior to the passage of the act of the 8th of July, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two; he might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such a suit being regarded as the trustee of the owner of the patent as respects such gains and profits; or the [600] owner of the patent might sue at law, in which case he would be entitled to recover as damages compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts,— the measure of damages in such case being not what the defendant had gained, but what the plaintiff had lost.[4] Where the suit is at law the measure of damages remains unchanged to the present time, the rule still being that the verdict of the jury must be for the *actual* damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict, not exceeding three times that amount, together with costs.[5] Damages of a compensatory character may also be allowed to the complainant suing in equity in certain cases where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury

[1] Dobson v. Hartford Carpet Co., 114 U. S. 439, 5 Sup. Ct. Rep. 945.

[2] Untermeyer v. Freund, 58 Fed. Rep. 205, 7 C. C. A. 183.

[3] Birdsall v. Coolidge, 93 U. S. 68.

[4] Curtis on Pat. (4th ed.) 461; 5 Stats. 123.

[5] 16 Stats. 207. See Coupe v. Royer, 155 U. S. 565, 582, 15 Sup. Ct. Rep. 199.

sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby.' Cases occurred under the prior patent act where manifest injustice was done to the complainant in equity suits by withholding from him a just compensation for the injury he sustained by the unlawful invasion of his exclusive rights, even when the final decree gave him all that the law allowed. Examples of the kind may be mentioned where the business of the infringer was so improvidently conducted that it did not yield any substantial profits, and cases where the products of the patented improvements were sold greatly below their just and market value in order to compel the owner of the patent, his assignees and licensees, to abandon the manufacture of the patented [601] product. Courts could not, under that act, augment the allowance made by the final decree, as in the case of a verdict of a jury; but the present patent act provides that the court shall have the same powers to increase the decree, in its discretion, that are given by the act to increase the damages found by verdicts in actions at law. Such difficulties could never arise in an action at law, nor can they now, as both the prior and present patent acts authorize the court to enter judgment on the verdict of the jury for any sum above the verdict, not exceeding three times the amount. No discretion is vested in the jury, but they are required to find the *actual damages* under proper instructions from the court."[1]

§ 1183. Damage recoverable at law. Where the plaintiff has sought his profit in the form of a royalty paid by his licensees and there are no peculiar circumstances in the case, the amount to be recovered will be regulated by that standard,[2] when a sufficient number of licenses or sales have been made to establish a market value.[3] Whenever an inventor

[1] Day v. Woodworth, 13 How. 372; Seymour v. McCormick, 16 id. 488.

[2] Philp v. Nock, 17 Wall. 460; Burdell v. Denig, 92 U. S. 716; Seymour v. McCormick, 16 How. 480; Birdsall v. Coolidge, 96 U. S. 64; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. Rep. 894.

[3] Locomotive Safety T. Co. v. Pennsylvania R. Co., 14 Phila. 432; Packet Co. v. Sickles, 19 Wall. 611; Sickles v. Borden, 4 Blatch. 14; Suffolk Co.

finds it profitable to exercise his monopoly by selling licenses to make or use his improvements he has himself fixed the average of his actual damage when his invention has been used without his license. If he claims anything above that amount he is bound to substantiate his claim by clear and distinct evidence.[1] He is, however, entitled to interest on the amount due him from the time payment should have been made.[2] The rule that the damages are measured by the royalty applies regardless of whether the patent infringed upon is a foundation patent or not.[3] If an infringement is deliberately made the defendant may be charged with the full amount of the established license fee although his use of the article wrongfully made may have continued for but a small portion of the time covered by the life of the patent. The effect of the payment will be to vest the right in the infringer to use the article during the life of the patent or until the article made by him is worn out.[4] "In order," says Mr. Justice Field, "that a royalty may be accepted as a measure of damages against an infringer who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention, and it must be uniform at the places where the licenses are issued."[5]

The payment of a sum in settlement of a claim for an alleged infringement cannot be taken as a standard to measure the value of the improvements in determining the damages in other cases of infringements.[6] Agreements made to secure the introduction of an invention are not such licenses as establish a measure of damages against an infringer.[7] If two prices

v. Hayden, 3 Wall. 315; Livingston v. Jones, 3 Wall. Jr. 330; Houston, etc. R. Co. v. Stern, 74 Fed. Rep. 636, 20 C. C. A. 568. See Bussey v. Excelsior Co., 1 McCrary, 161.

[1] Seymour v. McCormick, 16 How. 480, 490. See Singer Manuf. Co. v. Cramer, 109 Fed. Rep. 652, 48 C. C. A. 588; Wood v. United States, 36 Ct. of Cls. 418, 426.

[2] Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. Rep. 894.

[3] Timken v. Olin, 41 Fed. Rep. 169.

[4] Stutz v. Armstrong, 25 Fed. Rep. 147.

[5] Rude v. Westcott, 130 U. S. 152, 9 Sup. Ct. Rep. 463; Houston, etc. R. Co. v. Stern, 74 Fed. Rep. 636, 20 C. C. A. 568.

[6] Rude v. Westcott, *supra;* Cornely v. Marckwald, 131 U. S. 159, 9 Sup. Ct. Rep. 744, 32 Fed. Rep. 292.

[7] Graham v. Geneva, etc. Manuf. Co., 24 Fed. Rep. 642.

are agreed upon as a royalty, the lesser depending upon prompt payment, a third party's liability will be measured by it.[1] The general rule is not applicable where the invention infringed upon contains patents which are not appropriated by the infringer. In such a case the nature of the part used must be shown,[2] and the portion of the license fee paid therefor.[3] And so that rule is inapplicable where the only royalty established is for the right to use the patented article, and damages are sought for its wrongful sale. And a payment made for the whole monopoly of selling and manufacturing is not sufficient evidence of the value of the right to make occasional sales in particular territory; and so a royalty paid for a license to manufacture and sell under a covenant not to sue purchasers from the licensee is not the standard by which to measure the value of an ordinary selling right.[4] In the absence of evidence of the relative utility or value of two devices named in a patent, proof of the license fee paid for two improvements in an article is not competent to show the damage sustained by an infringement of one of the improvements.[5] But if there is evidence tending to show that the royalty which the patentee had received was for the second claim of his patent alone, and that the improvement covered by the first claim was a detriment to his apparatus, the jury may apportion the whole damages to the second claim.[6]

§ 1184. Same subject. The foregoing rule is deemed subordinate to the measure fixed by the statute — the actual damages,— and therefore it will be departed from whenever the court can see that it will give less or more than such damages.[7] There is no rule that will apply equally to all cases. The mode of ascertaining actual damages must necessarily depend on the nature of the monopoly granted,[8] and the character of the in-

[1] Id.

[2] Wooster v. Simonson, 16 Fed. Rep. 680. See McDonald v. Whitney, 39 id. 466.

[3] Porter Needle Co. v. National Needle Co., 22 Fed. Rep. 829.

[4] Colgate v. Western Electric Manuf. Co., 28 Fed. Rep. 146; La Baw v. Hawkins, 2 Bann. & Ard. 561.

[5] Hunt Bros. Fruit Packing Co. v. Cassidy, 53 Fed. Rep. 257, 3 C. C. A. 525, citing Philp v. Nock, 17 Wall. 460, and Seymour v. McCormick, 16 How. 480.

[6] S. C., 64 Fed. Rep. 585, 12 C. C. A. 316.

[7] Seymour v. McCormick, 16 How. 480; Birdsall v. Coolidge, 93 U. S. 68; Bates v. St. Johnsbury, etc. R. Co., 32 Fed. Rep. 628; Keller v. Stolzenbaugh, 43 id. 378.

[8] Id.

fringement. Thus, it was held by Judge Story that if the use of a machine is proven the value of the use would establish the measure of damages; but if the infringement consisted merely in making a machine and no actual damages were shown to have resulted, only a nominal sum should be awarded.[1] Where it was shown what sum the plaintiff would have obtained from the defendant for a patented machine and that a sale would have been made to him if he had not used the infringing machine, the recovery was regulated by such amount.[2] In England the principle is recognized that the plaintiff may have the damages assessed at such sum as the defendant would have had to pay for permission to do that which he wrongfully did.[3] In cases where there is no established patent or license [**602**] fee general evidence may be resorted to in order to get at the measure of damages; then, evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate.[4] In some cases this advantage, or the value of the use of the plaintiff's invention, is adopted as the measure of the actual damages.[5] A man who invents or discovers a new com-

[1] Whittemore v. Cutter, 1 Gall. 478.

[2] Blake v. Greenwood Cemetery, 21 Blatch. 222. In Blake v. Robertson, 94 U. S. 728, that measure of damages was denied because other patents than that owned by the plaintiff were involved, and their value was not proven.

[3] British Motor Syndicate v. Taylor, [1900] 1 Ch. 577, [1901] 1 Ch. 122; Pneumatic Tyre Co. v. Puncture Proof Pneumatic Tyre Co., 16 Rep. of Pat. Cas. 209.

[4] Suffolk Co. v. Hayden, 3 Wall. 315; Philp v. Nock, 17 id. 460.

The amount paid by the defendant for a license to use another patented invention, which he used after he had ceased to infringe upon the plaintiff's patent, and as a substitute therefor, was held to be the proper measure of the value of the plaintiff's invention to him. Sargent v. Yale Lock Manuf. Co., 17 Blatch. 249.

If there is no established license fee and the plaintiff has produced all the evidence of the value of the article he can and the defendant has offered no evidence, the manufacturer's price of the article, the percentage on such price which ordinarily constitutes a fair royalty, the judgment of an expert, and the price paid by an individual for two licenses under the patent, will be considered by the court in assessing damages. McKeever v. United States, 14 Ct. of Cls. 396; Wood v. United States, 36 id. 418, 426.

[5] Brodie v. Ophir Silver Mining Co., 5 Sawyer, 608; Carter v. Baker, 1 id. 527.

This measure applies in an action of *assumpsit* for the use of a patented invention, if there is no established royalty. Deane v. Hodge, 35 Minn. 146, 27 N. W. Rep. 917.

bination of matter, such as vulcanized India rubber or a valuable medicine, may find his profit to consist in a close monopoly, forbidding any one to compete with him in the market, he being himself able to supply the whole demand at his own price. If he should grant licenses to all who should desire to manufacture his composition, mutual competition might destroy the value of each license. This may be the case, also, where the patentee is the inventor of an entirely new machine. If any person could use the invention or discovery by paying what a jury might suppose to be the fair value of a license, it is plain that competition would destroy the whole value of the monopoly. In such case the profit of the infringer may be the only criterion of the actual damage to the patentee. It is, however, only when, from the peculiar circumstances of the case, no other rule can be found that the defendant's profits become the criterion of the plaintiff's loss.[1] It is observed in

[1] Seymour v. McCormick, 16 How. 480; Cowing v. Rumsey, 8 Blatch. 36.

In Packet Co. v. Sickles, 19 Wall. 611, Miller, J., said: "The rule in suits in equity of ascertaining by a reference to a master the profits which the defendant has made by the use of the plaintiff's invention stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of those profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers in the hands of the chancellor, the rule of assuming profits as the groundwork for estimating the compensation due from the infringer to the patentee has produced results calculated to suggest distrust of its universal application even in courts of equity. Certainly any unnecessary relaxation of the rule we have laid down in courts of law, where the patentee has been in the habit of selling his invention, or licenses to use it, so that a fair deduction can be made as to the value which he and those using it have established for it, does not commend itself to our judgment, nor is it encouraged by our experience. The reason of this rule is still stronger when the use of the patented invention has been with the consent of the patentee, express or implied, without any rate of compensation fixed by the parties."

In the subsequent case of Burdell v. Denig, 92 U. S. 716, the same judge said: "Profits are not the primary or true criterion of damages for infringement in actions at law. That rule applies eminently and mainly in cases in equity, and is based upon the idea that the infringer shall be converted into a trustee as to these profits for the owner of the patent which he infringes,—a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine the defendant's books and papers, and examine him on oath, as well as all his clerks and employees. On the other hand, as we have repeatedly

a late case that this topic is one upon which there has been some confusion and perhaps some variance in the cases, and the rule is declared to be that at law the plaintiff is entitled to recover, as damages, compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts — the measure of recovery in such cases being, not what the defendant has gained, but what the plaintiff has lost.[1] It has been held by at least one of the circuit courts of appeals that in the absence of an established royalty, and of proof of lost sales or injury by competition, the only measure of damages is such sum as, under all the circumstances, would have been a reasonable royalty for the defendant to have paid, which amount the jury may determine, and this they may do in the absence of testimony showing with mathematical certainty what would have been such royalty.[2] But this doctrine has been overthrown by the supreme court, and the rule established that, in the absence of proof of a license fee, market price, or other use of the invention than by the defendant, the recovery cannot exceed a nominal sum.[3] Where the patentee sues to recover for the use of his appliance from a licensee, the measure of recovery is not the worth or value of the appliance to the defendant, but its worth or value generally. . . Where the defendant is a wrong-doer and is infringing upon the rights of the patentee, then he may be required to pay the full value of the article to himself."[4]

§ 1185. Same subject; profits as damages. The conclusions reached by the supreme court of the United States on the

held, sales of licenses of machines or of a royalty established constitute the primary and true criterion of damages in an action at law. No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained; but it cannot be admitted . . . that in an action at law the profits which the other party might have made is the primary or controlling measure of damages."

[1] Coupe v. Royer, 155 U. S. 565, 582, 15 Sup. Ct. Rep. 199.

[2] Hunt Bros. Fruit Packing Co. v. Cassiday, 64 Fed. Rep. 585, 12 C. C. A. 316.

[3] Coupe v. Royer, *supra;* Seattle v. McNamara, 81 Fed. Rep. 863, 26 C. C. A. 652; Houston, etc. R. Co. v. Stern, 74 Fed. Rep. 636, 20 C. C. A. 568.

[4] Ft. Wayne, etc. R. Co. v. Haberkorn, 15 Ind. App. 479, 488, 44 N. E. Rep. 322.

various aspects of this branch of the subject have been thus stated: It is competent for a complainant, who has established the validity of his patent and proved an infringement, to demand, in equity, an account of the profits actually realized by the defendant from his use of the patented device; that the burden of proof is on the plaintiff; that where the infringed device was a portion only of the defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, the com- [603] plainant is entitled to nominal damages only.[1] In cases in which profits are the proper measure of damages it is the profits which the infringer makes or ought to have made which govern, and not those which the plaintiff shows that he might have made.[2] If there is no established license fee the jury are not to estimate damages for the whole life of the patent, but only for the period of the infringement. In such case a recovery does not vest the infringer with the right to continue the use of the patented machine or article.[3] It is otherwise at the election of the complainant if such a fee has been established,[4] and where it has not if the patentee does not use the invention himself, but manufactures and sells it at fixed prices, if he recovers the full amount of profits he would have obtained had he made and sold the article in question. It is said that by such claim and recovery he adopts the sale made by the defendant, and the right to use the specific article sold by

[1] Keystone Manuf. Co. v. Adams, 151 U. S. 139, 147, 14 Sup. Ct. Rep. 295.

[2] Seymour v. McCormick, 16 How. 480; Cowing v. Rumsey, 8 Blatch. 36; Packet Co. v. Sickles, 19 Wall. 611; Tilghman v. Proctor, 125 U. S. 136, 146, 8 Sup. Ct. Rep. 894; Keystone Manuf. Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. Rep. 295; Busch v. Jones, 16 D. C. App. Cas. 23, 43; Coupe v. Royer, 155 U. S. 565, 583, 15 Sup. Ct. Rep. 199; Piaget Novelty Co. v. Headley, 123 Fed. Rep. 897.

"An infringer cannot be heard to say that his superior skill and intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized. He is liable for all profits he has made by the illegal appropriation of another's invention." Lawther v. Hamilton, 64 Fed. Rep. 221, 224.

[3] Suffolk Co. v. Hayden, 3 Wall. 315; Spaulding v. Page, 4 Fish. Pat. Cas. 641, 1 Sawyer, 702.

[4] Stutz v. Armstrong, 25 Fed. Rep. 147; Sickels v. Borden, 3 Blatch. 535, 545; Perrigo v. Spaulding, 13 id. 389; Spaulding v. Page, *supra*.

the latter vests in his vendee.[1] But the recovery of merely nominal damages does not work this result, because the payment thereof is not a satisfaction.[2] The patentee may sue at law for the damages which he has sustained, and these he is entitled to recover whether the defendant has made any profits or not. In such an action it is precisely what is lost to the plaintiff, and not what the defendant has gained, which is the measure of the compensation to be awarded.[3]

Where the defendant's profits are sought to be made [**604**] the measure of the plaintiff's recovery it is a practical question, the solution of which will determine that claim or the extent to which it may be maintained, whether the defendant has by the infringement diverted the patronage of the plaintiff or diminished his profits from his invention. It was at one time ruled at the circuit that the law would presume that the plaintiff's profits were diminished in proportion to those made by the infringer;[4] but this was held erroneous in Seymour v. McCormick.[5] It is now settled that there is no such legal inference or presumption. Actual damages are required to be proved; they cannot be found unless the plaintiff furnishes the jury some *data* for the computation.[6] He must show his damages by evidence; they must not be left to conjecture; they must be proved, and not guessed.[7] But the general principle stated in another place[8] is not lost sight of in this class of actions where the infringement was wanton, or the evidence which will show more exactly the loss resulting therefrom is peculiarly within the defendant's possession or control. Under

[1] Spaulding v. Page, *supra*. See Steam Stone-Cutter Co. v. Sheldons, 15 Fed. Rep. 608.

[2] Blake v. Greenwood Cemetery, 21 Blatch. 222.

[3] Cowing v. Rumsey, 8 Blatch. 36.

[4] Wilbur v. Beecher, 2 Blatch. 132; Buck v. Hermance, 1 id. 398; Hall v. Wiles, 2 id. 194. See Holmes v. Truman, 67 Fed. Rep. 542, 14 C. C. A. 517.

[5] 16 How. 480. See Alexander v. Henry, 12 Rep. of Pat. Cas. 360; American Braided Wire Co. v. Thompson, 7 id. 152.

[6] Mayor v. Ransom, 23 How. 487; Seymour v. McCormick, 16 How. 480; Blake v. Robertson, 94 U. S. 728; Cowing v. Rumsey, 8 Blatch. 36; Philp v. Nock, 17 Wall. 460; Ingersoll v. Musgrove, 14 Blatch. 541; Cornely v. Marckwald, 131 U. S. 159, 9 Sup. Ct. Rep. 744; Bell v. United States Stamping Co., 32 Fed. Rep. 549; Royer v. Shultz Belting Co., 45 id. 51.

[7] Philp v. Nock, 17 Wall. 460; Hohorst v. Hamburg-American Packet Co., 91 Fed. Rep. 655, 34 C. C. A. 39.

[8] § 439.

such circumstances the defendant ought to be held to the most rigid accountability and no intendment made in his favor, founded on the alleged inconclusiveness of the plaintiff's proof of loss. Such proof ought to be considered and interpreted most liberally in his favor within the limit of an approximately accurate ascertainment of his damages.[1] On the trial of an action for infringement of a patent for a writing fluid no proof was given of the cost of the manufacture of the fluid or of the sale price; but it was shown that sales were highly profitable and that the defendant had made and sold very large quantities. He gave no evidence of the amount of the manufactures or sales, or of the cost of the article. The jury found a ver-
[605] dict for $2,000 for the plaintiff, and it was held that it must stand, not being one of palpable extravagance; that in such cases the plaintiff is not held to the most exact proof of the amount of his damages, and the jury are warranted in exercising a liberal discretion. If the defendant prefers to leave the damages to general inference and the estimate of the jury when he might make the amount reasonably certain by evidence on his part the finding of the jury will not be interfered with except in a case of plain extravagance.[2] But this doctrine, if it is in harmony with the later cases, does not justify the estimate of profits upon the basis of those made by establishments similar to that of the defendant's. The plaintiff has the burden of proof, notwithstanding the defendant has failed to disclose the condition of its business.[3] The damages will be computed on what the jury find from evidence is the loss the plaintiff has in some way sustained in consequence of the infringement. The profits of the defendant, to the extent that the jury find that they represent a loss of profits or gains which the plaintiff, but for the infringement, would have realized, may be accepted as the measure of his loss, but no further.[4] In the absence of proof of a license fee the jury may consider, in estimating the damages, the utility and advantage

[1] Bigelow Carpet Co. v. Dobson, 10 Fed. Rep. 385 (reversed as to the measure of damages in Dobson v. Hartford Carpet Co., 114 U. S. 439, 5 Sup. Ct. Rep. 945); Creamer v. Bowers, 35 Fed. Rep. 206; Regina Music Box Co. v. F. G. Otto & Sons, 114 id. 505; Rose v. Hirsh, 94 id. 177, 36 C. C. A. 132, 51 L. R. A. 81.

[2] Stephens v. Felt, 2 Blatch. 37.

[3] Keystone Manuf. Co. v. Adams, 151 U. S. 139, 148, 14 Sup. Ct. Rep. 295.

[4] Stephens v. Felt, *supra;* Pitts v.

to the defendant of the use of the patented device as compared with other means of obtaining similar results the use of which was open to it, and may compare the cost of using the one to the cost and saving in the use of the other.[1]

One who has obtained judgment for lost profits cannot, so long as it is unreversed, prosecute an action at law for other damages caused by the same acts of infringement which were recovered for in the equity suit.[2] After the satisfaction of a decree for the profits of sales there cannot be a recovery against the vendee of the patent of the profits derived by him from its use.[3]

§ 1186. Same subject; other measures of damage. Where the infringement is confined to a part of the thing used or sold by the infringer the recovery will be limited accordingly. It cannot be as if the entire thing were covered by the patent, or, where that is the case, as if the infringement were as large as the monopoly.[4] The plaintiff is entitled to recover in respect of any loss by reduction of the price of the article containing his invention in consequence of the infringement.[5] But it was held in Ingersoll v. Musgrove[6] that where the patentee claims damages for a reduction of his price caused by the defendant infringing the patent he must establish by satisfactory evidence not only that the reduction was caused by the infringement, but how much such reduction was; the extent to which it was occasioned by the acts of the defendant, and that it was made because the infringing article contained the invention. Such evidence must not be estimate, conjecture and opinion, but must be such as to afford a sound and safe basis of calculation.[7] The only persons who can be held [606] for damages for the infringement of a patent are those who own, or have some interest in, the business of making, using or selling the thing which is an infringement. An action at

Hall, 2 Blatch. 229; Ingersoll v. Musgrove, 14 id. 541; Carter v. Baker, 1 Sawyer, 527; English & American Machinery Co. v. Union Boot & Shoe Machine Co., 13 Rep. of Pat. Cas. 64.

[1] Brickill v. Mayor, etc., 60 Fed. Rep. 98, 8 C. C. A. 500; Suffolk Co. v. Hayden, 3 Wall. 315.

[2] Child v. Boston & F. Iron Works, 19 Fed. Rep. 258.

[3] Steam Stone-Cutter Co. v. Sheldons, 21 Fed. Rep. 875.

[4] Philp v. Nock, 17 Wall. 460.

[5] Carter v. Baker, 1 Sawyer, 527.

[6] 14 Blatch. 541.

[7] See Buerk v. Imhaeuser, 14 Blatch. 19.

law cannot be maintained against the directors, shareholders or workmen of a corporation which infringes a patented improvement.[1] Demands for damages and for profits for past infringements are assignable, and an assignee may recover for infringements which occurred when he was not the owner of the patent.[2] The vendor of a machine which is known to be the invention of another person is not liable for sales made before the inventor applied for a patent.[3]

§ **1187. Interest on damages.** The damages in these cases being unliquidated, interest is not generally allowed.[4] In one case the jury were permitted to add interest from the commencement of the action,[5] and in another to add it in their discretion, without restriction, to the time of commencing the action.[6] If, however, the amount of the royalty charged by the patentee is fixed by him before the infringement occurs the damages are so far liquidated that interest follows as compensation for delay in making payment.[7]

§ **1188. Exemplary damages.** The jury are required to find the actual damages, and have and can be allowed no discretion to go beyond that measure,[8] nor to allow counsel fees as part of such damages.[9] The power to inflict exemplary damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the jury.[10] It is only exercised where special reasons are shown, such as malice, insufficiency of the verdict, or the like.[11] It is a power to be used in view of the circumstances of the case. It may be exercised to remunerate parties who have been driven to liti-

United Nickel Co. v. Worthington, 13 Fed. Rep. 392.

[2] Consolidated Oil Well Packer Co. v. Eaton, 12 Fed. Rep. 865; Diddle v. Augur, 7 Blatch. 86; Gordon v. Anthony, 16 id. 234.

[3] Lyon v. Donaldson, 34 Fed. Rep. 789.

[4] Parks v. Booth, 102 U. S. 96; Silsby v. Foote, 20 How. 378; Littlefield v. Perry, 21 Wall. 205, 229; Mowry v. Whitney, 14 id. 620.

[5] Pitts v. Hall, 2 Blatch. 229.

[6] Tatham v. Le Roy, 2 Blatch. 478.

[7] Tilghman v. Proctor, 125 U. S. 136, 143, 8 Sup. Ct. Rep. 894; Locomotive Safety T. Co. v. Pennsylvania R. Co., 14 Phila. 432.

[8] Day v. Woodworth, 13 How. 372; Birdsall v. Coolidge, 93 U. S. 64; Seymour v. McCormick, 16 How. 480, 489; Buck v. Hermance, 1 Blatch. 398.

[9] Philp v. Nock, 17 Wall. 460; Day v. Woodworth, *supra*.

[10] Id.

[11] Schwarzel v. Holenshade, 2 Bond, 29, 3 Fish. Pat. Cas. 116; Lyon v. Donaldson, 34 Fed. Rep. 789; Morss v. Union Form Co., 39 id. 468.

gation to sustain their patents by wanton and persistent [607] infringement.[1] It will not be exercised in favor of the mere assignee of a right of action,[2] nor where the defense, though active and annoying, has not been legally wanton or unjustifiable.[3] The statute which authorizes courts of equity to treble the damages does not empower them to allow an increase in the recovery of profits.[4]

§ 1189. Compensation in equity. As has been stated, the present patent law gives to the successful plaintiff in an equity suit for an infringement the damages which he has sustained in addition to the profits to be accounted for by the defendant. As interpreted, this statute does not, in every case, entitle the plaintiff to such damages, but only when they are necessary to give him adequate compensation. If it appears that the injuries which he sustained are greater than the gains and profits realized by the defendant the plaintiff is entitled to recover compensation in the form of damages for the excess of the injuries sustained beyond the gains and profits received by the defendant.[5] Where the infringement is not wilful it is only compensation for actual loss that can be recovered in any event or form.[6] If the patentee has not acted in good faith toward the infringer and has been guilty of laches he can recover only such damages as he clearly proves.[7] There was nothing in the statutes relating to patents before the act of 1870 providing expressly for the recovery of the gains and profits of an infringement of a patent by suit in equity. The right must have been derived from the application of the general principles of justice as administered in courts of equity to the relations between the owners of patents and infringers created by the patent laws. The patentee owns the monopoly of the patented invention. When an infringer

[1] Brodie v. Ophir Silver Mining Co., 5 Sawyer, 608; National Folding-Box & Paper Co. v. Elsas, 86 Fed. Rep. 917, 30 C. C. A. 487, 81 Fed. Rep. 197.

[2] Schwarzel v. Holenshade, 2 Bond, 29, 3 Fish. Pat. Cas. 116.

[3] Welling v. La Bau, 35 Fed. Rep. 302.

[4] Campbell v. James, 5 Fed. Rep. 807; Covert v. Sargent, 42 id. 298.

[5] Buerk v. Imhaeuser, 14 Blatch. 19; Carew v. Boston Elastic F. Co., 3 Cliff. 356, 370; Birdsall v. Coolidge, 93 U. S. 64; Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. Rep. 199.

[6] Buerk v. Imhaeuser, *supra*.

[7] Jennings v. Rogers Silver Plate Co., 118 Fed. Rep. 339.

converts any part of the monopoly into money or anything else the owner has the right to follow his property in its new form. The person in whose hands it is becomes his trustee; not because he was ever a trustee of the invention or monopoly or had any right whatever to dispose of it for the owner, but because he had the money or other thing in his hands which the owner of the invention had the right to claim because the invention brought it. It is what is received for the invention that belongs to the owner of the patent, and when [608] that is not mixed with what is received for anything else there can be no difficulty about how much the owner of the patent is entitled to; when it is, the difficulty is wholly in making the separation.[1] "The general rule," said Gray, J., "has been sometimes said to be based upon the theory that the infringer is converted into a trustee for the owner of the patent, as regards the profits made by the use of his invention. But, as has been recently declared by this court, upon an elaborate review of the cases in this country and in England, it is more strictly accurate to say that a court of equity which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief by awarding as an equivalent or substitute for legal damages a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage."[2] It is held in the same case that the liability of an infringer for the profits made is not limited as to time because during a portion of the period he was doing the patentee a wrong an erroneous decision as to the scope of the patent was made in favor of another infringer in no way connected with the defendant.[3]

[1] Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatch. 24, 36, 18 id. 47; Littlefield v. Perry, 21 Wall. 205; Burdell v. Denig, 92 U. S. 716; Packet Co. v. Sickles, 19 Wall. 611; Livingston v. Woodworth, 15 How. 546; Williams v. Rome, etc. R. Co., 18 Blatch. 181; Regina Music Box Co. v. F. G. Otto & Sons, 114 Fed. Rep. 505; Rose v. Hirsh, 94 id. 177, 36 C. C. A. 132, 51 L. R. A. 801. See Head v. Porter, 70 Fed. Rep. 498.

[2] Tilghman v. Proctor, 125 U. S. 136, 148, 8 Sup. Ct. Rep. 894, referring to Root v. Railway Co., 105 U. S. 189, 214.

[3] Tilghman v. Proctor, *supra*.

§ 1190. Same subject; computation of profits. The profits made in violation of a patent-right within the meaning of the law are to be computed and ascertained by finding the difference between cost and yield. In estimating the cost the elements of price of materials, interest, expenses of manufacture and sale and other necessary expenditures, if there be any, and bad debts are to be taken into account, but usually nothing else.[1] The calculation is to be made as a manufacturer calculates the profits of his business. Profit is the gain made upon any business or investment when both the receipts and payments are taken into account. The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his own wrong. A more favorable rule would give a premium for dishonesty and invite to aggression.[2] Losses incurred by the defendant in consequence of his wrongful invasion of a patent are not chargeable to the plaintiff, nor can their amount be deducted from the compensation which he is entitled to.[3] A decree enjoining infringement and for account of profits does not subject the defendant to liability for more than the profits he has actually realized; it cannot be made to embrace others which he by diligence might have realized.[4] If the infringement is of a patent covering a process, in determining the gains and profits made by the infringer the expense of using the process in question is to be ascertained by the manner in which it has in fact been used; the comparison is not necessarily to be made with the cost at which the defendant used the process theretofore employed by him. He may show that other persons engaged in the same business used such process at less cost than he did.[5]

[1] Piaget Novelty Co. v. Headley, 123 Fed. Rep. 897, disallowing a claim for insurance and for legal services or expenses in successfully defending a prior suit.

[2] Rubber Co. v. Goodyear, 9 Wall. 788, 804. Compare Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 12 Sup. Ct. Rep. 49.

If the infringer of an article has produced only one-half the product he might have made, he will be credited with that proportion of the labor cost. Kinner v. Shepard, 118 Fed. Rep. 48.

[3] Crosby Valve Co. v. Safety Valve Co., *supra*.

[4] Livingston v. Woodworth, 15 How. 546. See Dean v. Mason, 20 id. 198; Burdell v. Denig, 92 U. S. 716; Packet Co. v. Sickles, 19 Wall. 611.

[5] Tilghman v. Proctor, 125 U. S. 136, 151, 8 Sup. Ct. Rep. 894.

[609] Where contractors laid a pavement for a city which infringed the patent of N. and the city paid them as much therefor as it would have had to pay N. had he done the work, thus realizing no profits from the infringement, it was held that in a suit in equity to recover profits against the city and the contractors the latter alone were responsible, although [610] the former might have been enjoined before the completion of the work and, perhaps, would have been liable in an action for damages.[1] If an infringer has not realized profit from the use of the invention he cannot be called upon to respond for profits;[2] the patentee in such a case is left to his remedy for damages. A patentee is entitled to recover the profits that have been actually realized from the use of his invention, although from other causes the general business of the defendant in which the invention is employed may not have resulted in profits,— as where it is shown that his invention produced a definite saving in the process of a manufacture. On the contrary, though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits none can be recovered.[3] And if other methods in common use produce the same results with equal expedition and without increased cost, if there is no established license fee for the use of the patented invention only nominal damages can be recovered.[4] Where the suit was for the infringement of a patent for a design for carpets, and it was not established that the defendant had made profit, it was held error to allow the complainant as damages in respect of the yards of infringing carpets made and sold by the former the sum per yard which was the profit of the latter in making and selling carpets with such design, there

[1] Elizabeth v. Pavement Co., 97 U. S. 126.

[2] Mere proof that the patented article could be made at less expense than those previously used to accomplish the same purpose does not establish that the infringer made profits unless it is shown that he is under obligation to make the older articles or would have made them if he had not manufactured the patented one. Bell v. United States Stamping Co., 32 Fed. Rep. 549.

[3] Elizabeth v. Pavment Co., 97 U. S. 126; Mowry v. Whitney, 14 Wall. 434; Cawood Patent, 94 U. S. 695; Tilghman v. Proctor, 125 U. S. 136, 146, 8 Sup. Ct. Rep. 894; Celluloid Manuf. Co. v. Cellonite Manuf. Co., 40 Fed. Rep. 476; Busch v. Jones, 16 D. C. App. Cas. 32, 43.

[4] Black v. Thorne, 111 U. S. 122, 4 Sup. Ct. Rep. 326.

being no evidence as to the added value of the carpet because of the appropriation of the design.[1] The case was held to be, in the absence of such evidence, one for nominal damages only. The opinion approvingly quotes language used in Garretson v. Clark:[2] "The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature." This principle was overlooked in a case in which a carpet manufacturer used patented looms. He was held liable for the net profits realized upon the number of yards of carpet made by the use of the invention in excess of the quantity that could have been made by the use of non-patentable looms.[3] Wallace, J., clearly shows that this is wrong because it ignores all the expense of the processes which the raw material of which the carpet is composed undergoes before it is ready for the loom. He applied a more just rule — the difference between the cost of weaving the carpet on the non-infringing and the infringing looms.[4] If, however, the patent is complete in itself, the fact that it can only be used in connection with something else, as a grate which is adaptable to a large variety of stoves, all the profits are recoverable.[5] And it has been held by Judge Coxe that under the act of 1887 the infringer of a design patent is liable for all the profit made on the article which embodies the design.[6]

[1] Dobson v. Hartford Carpet Co., 114 U. S. 439, 5 Sup. Ct. Rep. 945, reversing Bigelow Carpet Co. v. Dobson, 10 Fed. Rep. 385; Dobson v. Dornan, 118 U. S. 10, 6 Sup. Ct. Rep. 946. See 24 Stats. 387, as to liability for infringing patents for designs. As to liability for the penalty under that statute, see Anderson v. Pittsburgh Lumber Co., 47 Fed. Rep. 67; and see, as to the scope of that statute, Untermeyer v. Freund, 58 Fed. Rep. 205, 7 C. C. A. 183.

[2] 111 U. S. 127, 4 Sup. Ct. Rep. 291, 15 Blatch. 70, approved in Keystone Manuf. Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. Rep. 295.

[3] Webster v. New Brunswick Carpet Co., 2 Ban. & Ard. 67.

[4] Webster Loom Co. v. Higgins, 43 Fed. Rep. 673.

[5] Keep v. Fuller, 42 Fed. Rep. 896.

[6] Untermeyer v. Freund, 50 Fed.

§ 1191. Same subject. Interest on capital stock and "manufacturer's profits" are rejected as not entering into the cost; but wear and tear and repairs, and the value of the use of such real and personal estate belonging to the infringer, such as shops, fixtures and machinery employed in making the infringing machines, may properly be compensated as part of the cost.[1] And so of the expense of advertising the business and the amount paid as royalty for another patent which infringed upon plaintiff's, if the payment therefor was made in good faith.[2] The amount paid for insurance, it being for the [611] safety of the property generally and not for the benefit of the manufacturer of the infringing machines, will not be allowed as an item of their cost, nor the amount paid for local taxes on such property.[3] The infringer, being a corporation, may employ stockholders in the infringing work or business, and their wages or salaries, paid in good faith for services actually rendered, and not for the purpose of dividing or concealing profits, will be allowed as part of the deductions to arrive at net profits.[4] So if the defendant has cheapened the cost of producing the infringing device by an improve-

Rep. 77. The act provides: "And in case the total profit made by him [the infringer] from the manufacture or sale aforesaid of the article or articles to which the design or colorable imitation thereof has been applied exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the said sum of two hundred and fifty dollars."

[1] Rubber Co. v. Goodyear, 9 Wall. 788, 804; Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatch. 24; Am Ende v. Seabury, 43 Fed. Rep. 672; Winchester Repeating Arms Co. v. American Buckle & C. Co., 62 Fed. Rep. 278; Seabury v. Am Ende, 152 U. S. 561, 14 Sup. Ct. Rep. 683.

In Goulds Manuf. Co. v. Cowing, 105 U. S. 257, which has been styled an exceptional case, it was said that, in charging the defendant with profits, he should be allowed for the use of tools, machinery, power, and other facilities employed in the manufacture. In a later case (Seabury v. Am Ende, *supra*) the defendant's plant and real estate were used for several other and wholly different kinds of manufacture than the patented article, and the evidence offered to distinguish between the profits derived from the use of the plant and real estate for making that article and those attributable to the other sources of profit was not sufficient to enable a satisfactory apportionment or allowance for interest on the investment, hence interest was denied.

[2] La Baw v. Hawkins, 2 Ban. & Ard. 561.

[3] Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatch. 24; Winchester Repeating Arms Co. v. American Buckle & C. Co., 62 Fed. Rep. 278; Piaget Novelty Co. v. Headley, 123 id. 897.

[4] Id. The fact that salaries were paid must be shown. Am Ende v.

ment of his own, he is entitled to a corresponding credit in the ascertainment of the profits.[1] It is not the profits of the infringer's business, as a business, that are to be considered, but the advantage derived by him in the diminished cost of carrying it on by the use of the invention. Thus, in the case of the Cawood Patent,[2] it was urged against the recovery of the profits found from the defendants' infringing use of the plaintiff's patented invention for mending the crushed and exfoliated ends of railroad rails, that it would have been better for the defendants if, instead of repairing such rails, they had cut off the ends and relaid the sound parts, or had caused the rails to be rerolled. Mr. Justice Strong, delivering the opinion, thus answered this exception: "Experience, it is said, has proved that repairing worn-out ends of rails is not true economy, and hence it is inferred that defendants have derived no profits from the plaintiff's invention. The argument is plausible, but it is unsound. Assuming that experience has demonstrated what is claimed, the defendants undertook to repair the injured rails. They had the choice of repairing them on the common anvil or on the complainant's machine. By selecting the latter they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage growing out of their invasion of the complainant's patent. If their general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from loss. In settling [612] an account between a patentee and an infringer of the patent the question is not what profits the latter has made in his business or his manner of conducting it, but what advantage he has derived from his use of the patented invention."[3] The

Seabury, 43 Fed. Rep. 672; Seabury v. Am Ende, 152 U. S. 561, 570, 14 Sup. Ct. Rep. 683.

[1] Mason v. Graham, 23 Wall. 261.

[2] 94 U. S. 710.

[3] Knox v. Great Western Quicksilver Mining Co., 6 Sawyer, 430.

Where profits are recovered for sales of an infringing article, the thing sold must be parted *solutio pretii emptionis loco habetur.* 2 Kent Com. 387. The recovery of such profits, especially if followed by satisfaction, will preclude the owner of the patent from any action against the purchaser of the infringing article, and will prevent the original vendor, when sued for the profits, from availing himself of any supposed liability to such purchasers to

making and selling articles or machines which are an infringement are so far separable that, if there is a benefit on one portion and loss on another, the owner of the patent may claim the profits on those infringing machines which yielded a profit, without any deduction for the losses sustained by the infringer on others.[1] It is no reason for refusing to allow a patentee damages that the infringer might have sold the ingredients of which the patented article is composed at a larger profit than was realized for it.[2] If there is a purchase of patents and of the machinery for making the patented articles, in an accounting of profits no definite part of the sum

enhance the cost or diminish the profits. Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatch. 24.

[1] In Steam Stone-Cutter Co. v. Windsor Manuf. Co., *supra*, Wheeler, J., thus explains this point: "Here the Windsor Manufacturing Co. made eleven sales of eleven infringing machines, for profit; and, whatever of that profit arose from the appropriation of those patented inventions by the making and selling those machines, the orator is entitled to here, and no more. Other machines were made by the defendant, embodying the invention, which have been disposed of without profit, or are still on hand and cannot be disposed of, and which, as they are left, involve serious loss to the defendant; but these facts do not vary the amount received for those sold on which the profit was made. The defendant did not make nor sell any of them for the orator. The whole was done on its own account, as part of its own business, exclusively. Each infringement was separate, and no claim accrued in favor of the defendant against the orator on account of any of them. The losses of unfortunate attempts were the defendant's own losses, and there is nothing to set off against the orator's right to the avails of the successful attempts. If the defendant had been acting for the orator, and the whole enterprise, in connection with making this kind of machines, had been the enterprise of the orator, the net result would have been what the orator would have to stand to; but the enterprise was an enterprise of the defendant; none of the machines were made by the defendant for the orator; neither has the orator adopted the making or selling any machine as having been done for itself. It had nothing to do with any of the machines except as they included the patented invention, nor with the sale of any of the machines except as the sale included so much of the invention, and, as to that, it only claims what the invention brought, which is the same as if anything else belonging to the orator had been put into and sold with the machines, and the orator claimed what that brought. The orator waives the tort and proceeds for the money arising from the tort. The money arising here is what would be left, after deducting the cost of the machines which the defendant furnished, from the avails of the sales of the machines, including the invention that belonged to the orator." See S. C., 18 Blatch. 47.

[2] Am Ende v. Seabury, 43 Fed. Rep. 672.

fixed as the price of the patents can be added to the profits on the making of the patented articles.[1]

It has been ruled by Justice Harlan that in estimating the profits resulting from the infringement of a patent the comparison must be made between the patented invention and what was known and open to the use of the public at and before the date of the patent. The case involved the Cawood patent. The defendant claimed the right to use another patented device subsequent in date to that, and that such device produced equally as good results at less expense. The court said: The company had the right to use the subsequent device and take to itself all savings or profits derived from its use. "But it had no right to use the Cawood machine and enjoy the savings derived from said use, simply because it *may* have made the same profits at less expense from another machine, patented subsequently, which it was *at liberty* to use but chose *not* to use. . . . The owner of each invention is entitled to be protected in the exclusive enjoyment of his patent for the term prescribed by law. If the position of defendants' counsel be tenable, a prior patent may be practically destroyed and the owner be deprived of all profits arising therefrom by obtaining from a junior patentee a license to use his invention. If the latter be equally useful with the former the claim of the prior patentee for profits realized from the actual use of his invention by an infringer can always be defeated by showing that the infringer was *at liberty* to use, although he did not use, the subsequent invention, and might have made thereby the same or greater profit at less cost. Indeed, upon the principle or theory asserted by defendants' counsel, the junior patentee may himself use the invention of a prior patentee without liability to the latter for profits, provided he show that had he used his own invention he would have accomplished the same or better results at the same or less cost. I do not believe such to be the law, although in several cases cited by counsel there are general expressions which seem to sustain that view. But, after close study of those cases, I am of opinion that in no one of them was the precise point now

[1] Winchester Repeating Arms Co. v. American Buckle & C. Co., 62 Fed. Rep. 278.

under consideration in the mind of the court or necessarily involved in the decision."[1] In a case at law Judge Woods charged that the value of the invention at the time it is appropriated by the defendant is to be regarded as the basis upon which to calculate damages.[2] Where the defendant made a contract with a foreign company for a supply of articles which infringed a patent granted by the United Kingdom, some of which articles were delivered during the continuance of the patent, the remainder being delivered after its expiration, damages were awarded only upon those delivered during the life of the patent, and not upon the whole profit which might have been made if the contract had been entered into with the plaintiff instead of with the foreign company.[3]

§ 1192. Same subject; computation, to what time made. [613] The account for profits of the infringement is not limited to the commencement of the suit nor the date of the decree, unless the complainant limits the period within which he asks for damages.[4] Otherwise it is held proper to extend the account down to the accounting unless the infringement has ceased before that time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment. This practice saves a multiplicity of suits, time and expense, and promotes the ends of justice.[5] In a late case, tried and decided in the district of California, one exception to the master's report was that he should have limited his accounting to one furnace which contained the patented invention and was constructed prior to the commencement of the suit, and not have extended it to two furnaces erected and used at the same mine pending the suit; that, as to the latter, the cause of action had not arisen and it was not therefore involved in that accounting. But the court overruled the exception. Sawyer, J., said: "The suit is for an infringement of complainant's patent by the use of his invention. It is not a matter of any moment by what particular

[1] Turrill v. Illinois Central R. Co., 20 Fed. Rep. 912. See McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 466, 12 Sup. Ct. Rep. 40.

[2] National Car Brake Shoe Co. v. Terre Haute Car & Manuf. Co., 19 Fed. Rep. 515.

[3] British Insulated Wire Co. v. Dublin United Tramways Co., [1900] 1 Irish, 287.

[4] Creamer v. Bowers, 35 Fed. Rep. 206.

[5] Rubber Co. v. Goodyear, 9 Wall. 800.

machine defendant accomplished the infringement. He was infringing at the commencement of the suit, which is to obtain an account of profits resulting from the infringement and an injunction against further infringement. Defendant continued the infringement by using the same furnace then in use and by constructing and using others at the same mine. The profits resulting from the infringement in the use of the invention are sought to be recovered. The supreme court has held that the accounting should be continued down to the time of taking the account; and if so, I see no reason why it should not cover the profits of the entire use of the invention by whatever machine effected as well as the profits resulting from the use of the particular machine used at the time [614] of the commencement of the suit. If the infringment is by the manufacture and sale of the invention the accounting must necessarily extend to all sales to the time of the accounting, or the accounting must stop at the commencement of the action, for the same machine cannot well be made and sold before the bringing of the suit and again after its commencement. I can perceive no reason for applying a different rule in the case of the use of an invention from that applicable to its manufacture and sale. Besides, an injunction would certainly not be limited to the machine in use before or at the time of the institution of the suit. I think the accounting properly embraced all the machines containing the invention used by the defendant at its mine down to the time of accounting."[1]

§ 1193. Rule when whole article not patented. As we have had occasion to state heretofore, in cases where the patent is for a distinct improvement, separable from the rest of the article and not embracing the whole,[2] or is an inseparable improvement of it,[3] the profits must be limited accordingly.[4]

[1] Knox v. Great Western Quicksilver Mining Co., 6 Sawyer, 430.

[2] Buerk v. Imhaeuser, 14 Blatch. 19; Tremolo Patent, 23 Wall. 518; Mason v. Graham, id. 261.

[3] Goulds' Manuf. Co. v. Cowing, 14 Blatch. 315; Jones v. Morehead, 1 Wall. 155.

[4] Philp v. Nock, 17 Wall. 460; Seymour v. McCormick, 16 How. 480, 490; Jones v. Morehead, *supra;* Ingels v. Mast, 1 Flip. 424; Buerk v. Imhaeuser, 14 Blatch. 19; Goulds' Manuf. Co. v. Cowing, 12 id. 243, 14 id. 315; Black v. Munson, id. 265; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 12 Sup. Ct. Rep. 40; Keystone Manuf. Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. Rep. 295; Robbins v. Illinois Watch Co., 81 Fed. Rep. 957, 27 C. C. A. 21.

The profits recoverable are only those which have accrued from the use of the patented improvement; in such case the owner of the patent is not entitled to all the profits made from the entire article,[1] and has the burden of showing what portion thereof was derived from the use of the patented part.[2] It is as true of a process invented and an improvement in the process of a manufacture as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. The question is what advantage did the defendant derive from using the plaintiff's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits.[3] In Mowry v. Whitney[4] the defendant was charged by the master [615] with $91,000 as profits arising from the plaintiff's patent in manufacturing car wheels, which was the profit obtained from the manufacture of the entire wheel. Mr. Justice Strong said: "It is clear that Whitney is not entitled to more than the profits actually made in consequence of the use of his process in the manufacture of nineteen thousand eight hundred and nineteen wheels. It is the additional advantage the defendant derived from the process — advantage beyond what he had without it — for which he must account; . . . but

[1] Id.; Calkins v. Bertrand, 8 Fed. Rep. 755; Lattimore v. Hardsocg Manuf. Co., 121 id. 986; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. Rep. 799; Warren v. Keep, 155 U. S. 215, 15 Sup. Ct. Rep. 83.

[2] Dobson v. Hartford Carpet Co., 114 U. S. 439, 5 Sup. Ct. Rep. 945; Reed v. Lawrence, 29 Fed. Rep. 915; Fay v. Allen, 30 id. 446: Roemer v. Simon, 31 id. 41; Everest v. Buffalo Lubricating Oil Co., id. 742; Elgin Wind Power & Pump Co. v. Nichols, 105 Fed. Rep. 780, 45 C. C. A. 49; Robbins v. Illinois Watch Co., *supra*.

If, however, the defendant claims that any distinct part of the profits realized by him from the sale of the infringed article was the result of an improvement made by him, he has the burden of establishing his allegation. Marrs v. Union Form Co., 39 Fed. Rep. 468.

[3] Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. Rep. 291, 15 Blatch. 70; Shannon v. Bruner, 33 Fed. Rep. 871; Tomkinson v. Willets Manuf. Co., 34 id. 536; Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 12 Sup. Ct. Rep. 49; Mowry v. Whitney, 14 Wall. 620; Littlefield v. Perry, 21 Wall. 205; Knox v. Great Western Quicksilver Mining Co., 6 Sawyer, 430; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. Rep. 799; § 1190; Tuttle v. Claflin, 76 Fed. Rep. 227, 22 C. C. A. 138; Mosher v. Joyce, 51 Fed. Rep. 441, 2 C. C. A. 322.

[4] 14 Wall. 620.

the master charged the profit obtained from the entire wheel instead of that resulting from the use of Whitney's invention in a part of the manufacture." If the defendant has made additions to a patented machine which increased its effective power, although he took the whole of the vital and effective part of the invention, he may claim an apportionment of the profits; but the burden rests upon him to show that a portion of them resulted from such additions.[1] But there can be no apportionment where the essential parts of a patented machine are used if the infringing machine would be worth less without them, notwithstanding the substituted equivalents improved the work of the infringed machine.[2]

In Goulds' Manuf. Co. v. Cowing[3] the master reported that the profits resulting from the patented portion of the pump could not be separated from those resulting from any other part of it, because, making a comparison between the machine as it stands with its patented improvements and what would be left of it if these improvements were taken away, the machine would be valueless and would, in fact, be no machine at all. Therefore, he reported as profits to be recovered the entire profits of the pump. This was held erroneous. The court observed that pumps have been in use since the earliest ages of the world. After adverting to the part covered by the patent, Hunt, J., said: "The portion of the pump in question which belongs to or is included in the improvement of the plaintiffs is very small, and a machine constructed upon other known principles and devices applicable to pumps, omitting the plaintiffs' improvement, would include nearly everything useful that is to be found in the present machine. . . . The patentee takes the well known portions of a pump used in pumping gas-oil, with passages, valves, piston, chambers, openings, etc., as ordinarily made and used, and adds a chamber of an important construction, as it is alleged, and a combination with certain other parts described. Now if this addition is not a new and useful improvement no damages can be claimed for its use. If it is such an improvement, the improve- [616] ment in its nature and by law is and must be capable of being described and pointed out and must be described and pointed

[1] Tuttle v. Claflin, *supra*. [2] Id. [3] 12 Blatch. 243.

out. Every skilful mechanic must be able to learn from the patent itself precisely what the monopoly covers.[1] If this alleged improvement is so confounded with portions of the machine which are the subjects of other patents, or which, from long continued use, are open to the public, that it cannot be separated from them, or if, when so separated, it has no value, it is not a patentable invention, and no damages are due for its use. The decree in this case has adjudged the patent in this case to be valid. In its nature, therefore, it is and must be capable of separation and distinction from other portions of the machine." On appeal[2] the supreme court reversed the decree on the accounting, and held that the rule laid down in Mowry v. Whitney[3] was applicable. That rule gave the patentee the fruits of the advantage which the defendant derived from using his invention over what he had in using other processes open to the public and adequate to enable him to obtain an equally beneficial result. "It does not necessarily follow," Waite, C. J., said, "that where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. If, without the improvement, a machine adapted to the same uses can be made which will be valuable in the market and salable, then, as was further said in that case, the inquiry is, 'What was the advantage in cost, in skill required, in convenience of operation or marketability,' gained by the use of the patented improvement? If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Such we think is this case. Pumps for all ordinary and many extraordinary uses were very old; but in the new developments of business something was wanted to [617] take gas from the casing of an oil well and conduct it safely to the furnace of the engine. 'With that special pur-

[1] Act of July 8, 1870, 16 U. S. Stats. at Large, 201.

[2] 105 U. S. 253.

[3] 14 Wall. 620.

pose in view' this inventor took the well-known parts of an ordinary double-action pump, changed some of them slightly in form, added a new device, and produced something which would do what was wanted. While nominally he only made an improvement in pumps, he actually made an improved pump. For ordinary uses the improvement added nothing to the value of the old pump, but for the new and special purpose in view the old pump was useless without the improvement. The testimony shows that there was no market for pumps adapted to this particular use except in the oil-producing regions of Pennsylvania and Canada. The demand was limited as well as local. Less than a thousand pumps actually supplied all who wanted them. But for that particular use no other pump could at the time be sold. If the appellants kept the control of its monopoly under the patent it alone had the advantage of this market. Unless the appellees got the improved pump they could not become competitors in that field; and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales would have been effected. The fruits of the advantage they gained by their infringement were therefore necessarily the profits they made on the entire sale. This is an exceptional case. A limited locality required a particular kind of pump to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer, possessing the facilities the appellants had, could easily and with reasonable promptness fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances it is easy to see that what was the appellees' gain in this business must necessarily have been the appellant's loss, and consequently the appellant's damages are to be measured by the appellees' profits from their business in that special and limited market. This, as it seems to us, is the logical result of the rule [618] which has been stated. By infringing on the plaintiff's rights the appellees obtained the advantage of the increased marketability of their pump. The action of the court below, there-

fore, limiting the field of inquiry as to damages cannot be sustained."[1]

Where the rule stated applies and the infringing machine or appliance contains the improvements covered by the complainant's patents, the profits will not be diminished because he did or did not use the invention; nor will any allowance be made the defendants for the value of improvements covered by subsequent patents owned and used by him; nor for machines made and destroyed before sale or thereafter and exchanged for other machines which are not stated in the account on either side; nor will a credit be allowed him for such machines against the profits realized on others.[2]

§ 1194. Same subject. In the case of a patent for an ornamental chair as a new article of manufacture, where there is a difference in kind between that patented and prior chairs, and where what was open to the public could not make a chair like the patented article in its peculiar characteristics, the patentee is not, in ascertaining the damages sustained by an infringement of his patent, limited to the advantage derived by the defendant from using the peculiar features of the patented chair over what advantage he would have had from using what was so open to the public.[3] The plaintiff is entitled to recover an equivalent for any advantage which the defendant has derived from any unlawful use of the patented invention, and this advantage may be estimated either from profits made therefrom separately or in combination with something else which the patent does not cover. The profits will be computed in the manner best suited to afford the injured party the full benefit of his patent unlawfully used and a just indemnity for the injuries he has thereby sustained.[4] If the improvement is only a constituent of a machine, but required to adapt it to a particular use, and there is no other way open to the public of supplying the demand for that use, then the in-

[1] Fifield v. Whittemore, 33 Fed. Rep. 835; Welling v. La Bau, 34 id. 40; Holmes v. Truman, 67 Fed. Rep. 542, 14 C. C. A. 517; Wales v. Waterbury Manuf. Co., 101 Fed. Rep. 126, 41 C. C. A. 250; Mosher v. Joyce, 51 Fed. Rep. 441, 2 C. C. A. 322; Hurlbut v. Schillinger, 130 U. S. 456, 9 Sup. Ct. Rep. 584; Heaton Button-Fastener Co. v. Macdonald, 57 Fed. Rep. 648.

[2] Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 12 Sup. Ct. Rep. 49.

[3] Mulford v. Pearce, 14 Blatch. 141.

[4] Mason v. Graham, 23 Wall. 261.

fringer has, by his infringement, secured the advantage of a market he would not otherwise have had, and the fruits of it are the entire profits made in that market.[1] In response to an order of reference to take an account of the plaintiff's damages and of the defendant's profits by infringement the master reported that there were no damages and no profits, but that the plaintiff was entitled to compensation for the defendant's use of his patent. It appeared that such use restored the salable character of the article the defendant made, and thus saved him from loss. It was held that the money [**619**] value of this advantage could not be recovered as compensation.[2] Remote profits or advantages of the infringement are not taken into account. Where the defendant, by the use of the plaintiff's patented process for preserving fish, was enabled to withdraw fish from the market and thus obtain a higher price for it unpreserved than he would otherwise have received, it was held that the profits resulting from such increased price were too remote and indirect to be charged to the defendant as profits realized from the infringement.[3]

§ **1195. Same subject; ascertainment of profits.** In determining the profits from the infringement of a patent which covers only a part of a machine or article made and sold, a ratable proportion of the cost of production and sale must be taken into the account. In the case of the Tremolo Patent[4] the defendants were vendors of musical instruments, including organs and melodeons, which they purchased from the manufacturers. Some of these contained the tremolo attachment, and others did not. For those containing such attachment they paid an additional price and sold them for an increased price. They were found guilty of infringing the plaintiff's patent in making sales of the organs having that attachment. In the ascertainment of the profits made by the sale of the tremolo attachment the defendants were allowed by the master to prove the general expenses of their business incurred in effecting the sales of all musical instruments, and to deduct a ratable proportion from the profits made by the sale of those with that

[1] Goulds' Manuf. Co. v. Cowing, 105 U. S. 253.

[2] Sargent v. Yale Lock Manuf. Co., 17 Blatch. 249.

[3] Piper v. Brown, 1 Holmes, 196.

[4] 23 Wall. 518.

attachment. It was contended in behalf of the plaintiff that the patent infringed was not the tremolo itself, but for the combination of the organ and tremolo, and that if the defendants obtained an extra price for the organ combined with the tremolo without incurring any additional expense, the whole of that extra price was obtained from the addition of the combination; also, that the true rule in such a case was that if the infringing device is an integral part of the whole instrument, without which it is incapable of use and for which a single charge is [620] made, then in ascertaining profits on a part of the organization general expenses should be apportioned according to the cost or to some other equitable rule. But when the infringing device is an optional one, used or not at pleasure, and an extra price is charged and received for it when used, the true profit made is the extra sum received for the addition, deducting only such expenses as are incurred by reason of it. In answer to this argument the court say: "We think such a rule, even if it sometimes may be just, is inapplicable to the present case. We cannot see why the general expenses incurred by the defendants in carrying on their business, such expenses as store rent, clerk hire, fuel, gas, porterage, etc., do not concern one part of their business as much as another. It may be said that the selling a tremolo attachment did not add to their expenses, and therefore that no part of those expenses should be deducted from the price obtained from such an attachment. This is, however, but a partial view. The store rent, the clerk hire, etc., may, it is true, have been the same if that single attachment had never been bought or sold. So it is true that the general expenses of their business would have been the same if instead of buying and selling one hundred organs they had bought and sold only ninety-nine. But will it be contended that because buying and selling an additional organ involved no increase of the general expenses the price obtained for that organ above the price paid was all profit? Can any part of the whole number sold be singled out as justly chargeable with all the expenses of the business? Assuredly no. The organ with the tremolo attachment is a single piece of mechanism, though composed of many parts. It was bought and sold as a whole by the defendants. It may be said the general expenses of the business would have been the same if any one of these parts

had been absent from the instrument sold. If, therefore, in estimating profits every part is not chargeable with a proportionate share of the expenses, no part can be. But such a result would be an injustice that no one would defend. We think it very plain, therefore, that there was no error in the rule adopted for the ascertainment of the profits made by the defendants out of their infringement of the complainant's patent." [1]

§ 1196. Profits recoverable though no license fee established. The owner of the patent is entitled in equity [621] to recover profits made by the infringer though the former was exercising his monopoly by granting licenses. He is not limited in that forum to license fees, though such profits exceed in amount what he would have realized in such fees for what was done by the infringer. By the express provisions of the statute the plaintiff is entitled to recover in addition to the profits to be accounted for by the defendant "the damages sustained by the infringement." [2] This shows that in contemplation of law the profits actually realized by the infringer belong to the patentee, and that when the profits will not compensate for the damages sustained, as they may not in many cases, he is entitled to damages beyond.[3] The right given by the statute to recover in equity damages besides profits is not intended to give the owner double compensation; but the net profits made from the unlawful use of his invention, and such supplemental damages proved as will make the decree on the whole a full compensation. If the business of the infringer is so improvidently conducted that he makes no substantial profits the owner of the patent may have his compensation calculated on the basis of a license fee.[4] In the

[1] See Steam Stone-Cutter Co. v. Windsor Manuf. Co., 18 Blatch. 47.

In Zane v. Peck, 13 Fed. Rep. 475, the amount paid for clerk hire, storage, freight, etc., was not deducted in estimating the cost of manufacture and sale. Because the items would aggregate but a trifling sum the court refused to order a reaccounting.

[2] R. S., § 4921. Independently of statute both profit and damages cannot be recovered. United Horse Shoe & Nail Co. v. Stewart, 13 App. Cas. 401; Neilson v. Betts, L. R. 5 H. of L. 1.

[3] Wooster v. Taylor, 14 Blatch. 403; Carew v. Boston, etc. Co., 3 Cliff. 356; Williams v. Rome, etc. R. Co., 18 Blatch. 181.

[4] Marsh v. Seymour, 97 U. S. 348; Birdsall v. Coolidge, 93 id. 64.

ascertainment of such damages there is required the same certainty of proof as at law. Where there is a loss of profits in the plaintiff's business by a diversion of his customers by the defendant's sale of an infringing article or machine, or a reduction of price from the same cause, damages may be recovered therefor.[1] It will not be presumed as matter of law, but must be established as a fact, that because the defendant has sold an infringing article there has been a corresponding or any falling off of the plaintiff's business.[2] In one case[3] the court said: "It was not made to appear that the plaintiff could have sold his watches to the persons who purchased from the [622] defendants. The watches have been adjudged to be identical in principle, but they differ in structure and appearance; and it cannot be known that those who bought the infringing articles would have bought the plaintiff's watches under any circumstances. The difference in structure, as well as the difference in price, enter into that question, and no means are afforded for determining it by proofs."[4] Where the infringer originally bought large numbers of a patented article from the patentee and subsequently began its manufacture himself, but did not wholly cease buying, it was held reasonable to believe that had he not manufactured he would have purchased as large a number as he made and used.[5] If machines are substantially alike and are made in the same locality for a similar market, the profits made by one manufacturer furnish a sufficiently reliable basis upon which to estimate

[1] Buerk v. Imhaeuser, 14 Blatch. 19; Carter v. Baker, 1 Sawyer, 527; Birdsall v. Coolidge, *supra;* Zane v. Peck, 13 Fed. Rep. 475; Am Ende v. Seabury, 43 id. 672; Yale Lock Manuf. Co. v. Sargent, 117 U. S. 536, 6 Sup. Ct. Rep. 934; United Horse Shoe & Nail Co. v. Stewart, 13 App. Cas. 401; American Braided Wire Co. v. Thompson, 44 Ch. Div. 274.

[2] Boesch v. Graff, 133 U. S. 697, 10 Sup. Ct. Rep. 378.

[3] Buerk v. Imhaeuser, *supra.*

[4] Smith v. Pryor, 2 Sawyer, 461; Carter v. Baker, 1 id. 512; Seymour v. McCormick, 16 How. 480; Ingersoll v. Musgrove, 14 Blatch. 541.

If it appears that the defendant placed the infringing article on the market at a much lower price than the patented one was sold by the complainant, it cannot be assumed as a basis for computing his loss of profits that, but for the infringement, there would have been sold at the higher price the same number of articles as were sold at the lower price. Jennings v. Rogers Silver-Plate Co., 105 Fed. Rep. 967.

[5] Creamer v. Bowers, 35 Fed. Rep. 206.

those made by another, especially if the defendant refuses to disclose his profits.[1]

§ 1197. Interest. Profits being regarded as unliquidated damages, interest is not usually allowed until they have been judicially liquidated.[2] It may be refused altogether, or allowed after interlocutory or after final decree, according to the circumstances of the case. If a reference is made to a master interest is not usually to be allowed before the date of the submission of his report, and only upon the amount shown thereby and by the accompanying evidence to be due.[3] It is properly allowed from that time.[4] Where damages are doubled under the statute interest cannot be allowed from the filing of the bill. This would result in doubling the interest, which would not be lawful even if interest was allowable.[5]

[1] Adams v. Keystone Manuf. Co., 41 Fed. Rep. 595.

[2] Mowry v. Whitney, 14 Wall. 653; Parks v. Booth, 102 U. S. 96; Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatch. 35, 18 id. 47; Littlefield v. Perry, 21 Wall. 205, 229. See Silsby v. Foote, 20 How. 378.

[3] Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. Rep. 894.

[4] Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 12 Sup. Ct. Rep. 49; Campbell v. Mayor, etc., 105 Fed. Rep. 631.

[5] National Folding-Box & Paper Co. v. Elsas, 81 Fed. Rep. 197.

CHAPTER XXXII.

INFRINGEMENT OF COPYRIGHT.

§ 1198. Copyright is statutory.
1199. Compensatory and penal recoveries.

[623] **§ 1198. Copyright is statutory.** The law recognizes and protects literary property, which is the right of the owner to possess, use and dispose of intellectual productions.[1] It is a property which does not come into being until some mental conception has been embodied in written or spoken language, or otherwise signified as an intellectual creation in such manner as to be capable of recognition and identification. It includes copyright, playright and original proprietorship in works of art.[2] It is property held by a peculiar tenure. Whatever may have been the original common law, it seems to have been long settled on both sides of the Atlantic that beyond an absolute right to such productions before publication, the author or his assigns have only such special right in them

[1] Drone on Copyright, 97; Press Pub. Co. v. Monroe, 73 Fed. Rep. 196, 19 C. C. A. 429; Maxwell v. Goodwin, 93 Fed. Rep. 665.

[2] Lord Mansfield, in Millar v. Taylor, 4 Burr. 2396, said: "I use the word 'copy' in the technical sense in which that name or term has been used for ages to signify an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters."

The intellectual productions to which the law extends protection are of three classes: First, writings or drawings capable of being multiplied by the arts of printing and engraving; second, designs of form or configuration capable of being reproduced upon the surface or in the shape of bodies; third, inventions in what are called the useful arts. To the first class belong books, maps, charts, music, prints, and engravings; to the second class belong statuary, bas-reliefs, designs for ornamenting any surface and configuration of bodies; the third class comprehends machinery, tools, manufactures, compositions of matter, and processes or methods in the arts. According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing which may be multiplied by the art of printing in any of its branches. Property in other classes of intellectual objects is usually secured by letters patent, and the interest is called patent-right. But the distinction is arbitrary and conventional. Bouv. L. Dic.

afterwards as is granted by statute.[1] An author has the same right to his unpublished manuscripts as to any other [624] property, and may resort to the same legal and equitable remedies in case of actual or threatened infractions in one case as in the other. He may publish his productions or not as he chooses, and may prevent their publication without his consent.[2] But when he has published them he is supposed to have thereby obtained remuneration, and thenceforth has no special property in them; he then has no exclusive right to multiply copies or to control the subsequent issue of copies by others. The right to multiply copies to the exclusion of others is the copyright, and is restricted and governed by the statutes on that subject.[3]

§ 1199. Compensatory and penal recoveries. The [625] present statute, enacted by congress, provides a distinct remedy for infringement in respect to the different classes of literary property and according to the nature of the wrong.[4]

[1] Turner v. Robinson, 10 Irish Ch. (N. S.) 121, 501; Oliver v. Oliver, 11 C. B. (N. S.) 139; Prince Albert v. Strange, 1 MacN. & G. 25; Wheaton v. Peters, 8 Pet. 656; Boucicault v. Wood, 2 Biss. 33; Crowe v. Aiken, id. 208; Wall v. Gordon, 12 Abb. Pr. (N. S.) 349; Palmer v. Dewitt, 47 N. Y. 532, 7 Am. Rep. 480; Stevens v. Gladding, 17 How. 447; Little v. Hall, 18 id. 165. See Donaldson v. Beckel, 4 Burr. 2408.

[2] Press Pub. Co. v. Monroe, 73 Fed. Rep. 196, 19 C. C. A. 429.

[3] Cases cited in third note to this section; Short's Law of Literature, 48; Parton v. Prang, 3 Cliff. 537; Bartlette v. Crittenden, 4 McLean, 300; Paige v. Banks, 13 Wall. 608; Carter v. Bailey, 64 Me. 458, 18 Am. Rep. 273; Banker v. Caldwell, 3 Minn. 94; Kiernan v. Manhattan Quotation Tel. Co., 50 How. Pr. 194. See Drone on Copyright, p. 100.

[4] § 4964, as amended, 1891. Every person who, after the recording of the title of any book and the depositing of two copies of such book as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish, dramatize, translate or import, or knowing the same to be so printed, published, dramatized, translated or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

§ 4967 in part, as amended, 1897. Every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, shall be liable to the author or proprietor for all damages occasioned by such injury.

§ 4965, in part, as amended, 1895. If any person, after the recording of the title of any map, chart, dramatic

After the title page has been deposited the author can maintain an action for an infringement or violation of his rights.[1] [626] But after publication it must be shown as a condition of recovery that within ten days from publication he delivered at the office of the librarian of congress, or deposited in the mail properly addressed to that officer, two copies of such copyright book.[2] The forfeitures declared in the statute can only be recovered by actions at law.[3] And it is so with regard to the damages, other than profits as such.[4] In this particular the remedy in equity is less comprehensive than that allowed by the statute for infringement of patent-rights. By the statute[5] jurisdiction is given to the courts of the United States of

or musical composition, print, cut, engraving, or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated or imported, shall sell or expose to sale any copy of such map, or other article as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale. . . . One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States.

§ 4966, in part, as amended, 1897. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just. . .

[1] Roberts v. Myers, 13 Law Rep. 398; Boucicault v. Wood, 2 Biss. 34.

[2] Merrell v. Tice, 104 U. S. 557. See Callaghan v. Myers, 128 id. 617, 9 Sup. Ct. Rep. 177. The statute is sufficiently complied with if the copies are deposited immediately before the publication of the book. Belford v. Scribner, 144 U. S. 488, 12 Sup. Ct. Rep. 734.

[3] Stevens v. Cady, 2 Curt. 200; Stevens v. Gladding, 17 How. 447; Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. Rep. 177.

[4] Chapman v. Ferry, 12 Fed. Rep. 693.

[5] § 4970.

suits and actions arising under the copyright laws, and power is given them to grant injunctions according to the course and practice of courts of equity, an incident of which is the right to an account of profits.[1] In Stevens v. Gladding the court refer to Colburn v. Simms,[2] in which it is said: "It is true that the court does not by an account actually measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court by the account as the nearest approximation it can make to justice takes from the wrong-doer all the profits he has made by his piracy and gives them to the party who has been wronged. In doing this the court may often give the injured party more in fact than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold if the injury by the sale of the cheaper had not been committed. The court of equity, however, does not give anything beyond the account." In Stevens v. Gladding, at the circuit,[3] the court held the owner of a copyright entitled to the profits arising from the sales on commission of pirated copies; that a court of equity may decree an account of such profits, as it would those realized by a partnership.[4] The case of Backus v. Gould[5] arose under the act of 1831, and in [627]

[1] Stevens v. Gladding, Chapman v. Ferry, *supra*.

[2] 2 Hare, 554.

[3] 2 Curt. 608.

[4] In this case Curtis, J., said: "I perceive no sound reasons for restricting those gains to the difference between the cost and the sale price of a map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a percentage on the amount of sales. What he so receives is the gross profits coming to him from the proceeds of the sale, and what he so receives diminishes the net profit of him who employs him to sell. When the latter is called on to account, he has an allowance for the commissions he has paid, because those sums, though part of the gross profits of the sales, he has not received."

In Pike v. Nicholas, L. R. 5 Ch. 260, note, James, Vice Ch., thus laid down the rule of accounting in equity in case of invasion of a copyright: "The defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies."

[5] 7 How. 798.

It is said in Bolles v. Outing Co.,

the argument of Mr. Bayard is a statement of the English and American statutes on the subject of copyright to that time. Section 6 of that act provided, among other things, that the infringer "shall forfeit and pay fifty cents for every sheet which may be found in his possession, either printed, printing, published, imported, or exposed to sale contrary to the intent of this act." It was held that this clause was penal and should be strictly construed; therefore the penalty was only collectible in respect of sheets found in the possession of the infringer. The corresponding section in the present patent law substitutes for the foregoing clause one for the recovery of damages. But section 4965 contains a similar clause relative to pirated maps, charts,[1] dramatic or musical compositions, prints, cuts, engravings, photographs or chromos.[2] That section has received the same construction as was given the earlier act,[3] and the same rule has been applied to the section as amended by the act of 1895.[4]

There are not many decisions in respect to damages at law under the provisions of the statute providing for their recovery. In Boucicault v. Wood[5] the court submitted the question of the amount generally to the jury, stating that it is a question of proof, and upon that the jury were to form their own conclusions as to the damages the plaintiff had actually sustained. It is believed that the same considerations that govern in legal actions for infringement of patent-rights would apply. The injury is similar, and such cases would appear to be analogous. The view thus expressed in the first edition of this work has been confirmed by the recent case of Callaghan v. Myers.[6] It is there laid down that in ascertaining the profits made by an

175 U. S. 262, 267, 20 Sup. Ct. Rep. 94, that Backus v. Gould must be regarded as overruling anything to be found to the contrary in Reed v. Carusi, Taney, 72, 20 Fed. Cas. 431; Dwight v. Appleton, 8 Fed. Cas. 143; Millet v. Snowden, 17 id. 374.

[1] See Taylor v. Gilman, 24 Fed. Rep. 632.

[2] The statute is penal and must be construed strictly. A principal is not liable for the prescribed penalty or forfeiture because of the acts of his agent done without his knowledge. Taylor v. Gilman, *supra*.

[3] Bolles v. Outing Co., 175 U. S. 262, 20 Sup. Ct. Rep. 94; Thornton v. Schreiber, 124 U. S. 612, 8 Sup. Ct. Rep. 618.

[4] Falk v. Curtis Pub. Co., 107 Fed. Rep. 126, 46 C. C. A. 201; Child v. New York Times Co., 110 Fed. Rep. 527.

[5] 2 Biss. 34.

[6] 128 U. S. 617, 9 Sup. Ct. Rep. 177, 24 Fed. Rep. 636.

infringing publisher of several volumes of judicial reports that the cost of stereotyping them, the amount paid to the members of the infringing firm for their services as salaries for conducting the firm business during the time the infringing was done, the cost of producing copies which remained unsold, the amount paid for editorial work in preparing such volumes, is not to be deducted. The infringer is chargeable with the profit made on the resale of volumes originally sold by him as well as with that realized on the first sale. If part of the matter in the volumes, such as the opinions of the court, is not the subject of copyright, but it is useless without the head-notes, statements of fact, arguments of counsel, table of cases and other matter prepared by the reporter who has obtained the copyright, the entire profit on the whole may be recovered.[1]

A married woman whose work has been copyrighted by her publisher and who has settled with him from time to time for royalties will be presumed to have conveyed to him the legal title to the copyright so that he may recover the profits made by an infringing publisher, notwithstanding there is no proof that the laws of her domicile have removed her common-law disabilities or that her husband joined in the conveyance of his wife's rights.[2] The printer of an infringing book is liable with the publisher for whom he does the work for the profits realized.[3]

Where a manuscript is published in wanton disregard of the rights of the author the jury may award exemplary damages, notwithstanding proof of actual pecuniary damage was not made; and if the publication was made by a corporation which ratified the act of its representative, the liability for such damages, in the discretion of the jury, exists.[4] Section 4966[5] has no semblance of a penal nature; it provides a minimum sum for a recovery in any case, leaving the case open for a larger recovery upon proof of greater damage. The liability, extra the statute, is for all the damages that are the direct result of the wrongful act.[6]

[1] Belford v. Scribner, 144 U. S. 488, 12 Sup. Ct. Rep. 734.

[2] Belford v. Scribner, *supra*.

[3] Id.

[4] Press Pub. Co. v. Monroe, 73 Fed. Rep. 196, 19 C. C. A. 429.

[5] See first note to this section.

[6] Brady v. Daly, 175 U. S. 148, 154, 20 Sup. Ct. Rep. 62. See Chatterton v. Cave, L. R. 3 App. Cas. 483, 492, which seems to be in accord.

Under the English copyright act the proprietor of a copyright in a book has a remedy for the infringement thereof by a special action on the case; he may also sue the offender in detinue or trover, or, if necessary, in both combined. All these remedies may be availed of by action in the chancery division. If the defendant has possession of some of the infringing copies and has sold others, without profit thereon, the plaintiff is entitled to recover the former and also to damages representing the proceeds of the copies sold.[1]

[1] Muddock v. Blackwood, [1895] 1 Ch. 58.

CHAPTER XXXIII.

INFRINGEMENT OF TRADE-MARKS.

§ 1200. Nature of the right to a trade-mark and of the wrong of infringement.
1201, 1202. The measure of damages.

§ 1200. Nature of the right to a trade-mark and of the wrong of infringement. This injury is one to the good- [628] will of a business. Redress for it by recovery of damages is founded on the obvious principle that if one, by any false pretense, draws away another's customers, either with intent to lessen the latter's profits or to unlawfully appropriate them, he commits a wrong for which compensation proportioned to the injury may be recovered. This principle embraces all deceits by which that injurious loss of business is accomplished. Thus a merchant designated his goods by a label which would not be protected as a trade-mark; the words used were not strictly true, though they were not calculated to deceive or injure the public. Another merchant adopted the same label, placed it upon inferior goods, which he put upon the market. It was held that he was liable in an action in the nature of deceit; that specific damage need not be alleged or proved to sustain the action, but the jury might give general damages.[1] Everywhere courts proceed upon the theory that a party has a valuable interest in the good-will of his trade, and in the labels or marks which he adopts to enlarge and perpetuate it.[2] A dealer has a property in his trade-mark. The ownership is allowed him that he may have the exclusive benefit of the

[1] Conrad v. Joseph Uhrig Brewing Co., 8 Mo. App. 277; McLean v. Fleming, 96 U. S. 245; Wotherspoon v. Currie, L. R. 5 Eng. & Ir. App. 508; Rodgers v. Nowill, 6 Hare, 325, 5 M., G. & S. 109; Lee v. Haley, L. R. 5 Ch. App. 155. See Auburn, etc. P. R. Co. v. Douglass, 12 Barb. 557.

[2] Id.; Amoskeag Manuf. Co. v. Spear, 2 Sandf. 599; Colladay v. Baird, 4 Phila. 139; Partridge v. Menck, 2 Barb. Ch. 101; Walton v. Crowley, 3 Blatch. 440; Levy v. Walker, 10 Ch. Div. 436, 27 Moak, 17, note; Shaw v. Pilling, 175 Pa. 78, 34 Atl. Rep. 446; Armington v. Palmer, 21 R. I. 109, 42 Atl. Rep. 308, 43 L. R. A. 95; N. K. Fairbank Co. v. Windsor, 118 Fed. Rep. 96.

reputation which his skill has given to articles made or sold by him that no other person may be able to sell to the public as his that which is not his.[1] And there is no difference be- [629] tween citizens and aliens in respect to their rights in trade-marks and in being entitled to have such rights protected in our courts.[2]

The infringement of a trade-mark causes injury by legal presumption as the result of a fraudulent representation that the infringer's use of that mark is the proprietor's use. If it be a label or mark upon goods manufactured or sold there is in the infringer's use of it an implied representation by him that the goods on which he places the label or mark are those of the person who adopted the mark and has been accustomed to designate his goods by it. Such infringement may injure the proprietor of the mark in three ways: By dividing, and to some extent diminishing, the demand upon him for his goods; by depreciating them by having their merits determined by the deceived consumers of or the dealers in the inferior article,[3] and by compelling the plaintiff to reduce his prices.[4] The quality, however, of the simulated article is immaterial except as it affects the amount of the injury. The proprietor of the trade-mark suffers injury, and has undoubted claim to damages if the natural effect of the transaction of the infringer is to palm off on purchasers a different article from that which they intended to buy, and to interfere with the right of such proprietor to profits to which the reputation of his article justly entitled him.[5] One commits a legal wrong when

[1] Clark v. Clark, 25 Barb. 76; Williams v. Johnson, 2 Bosw. 1; Dixon Crucible Co. v. Guggenheim, 2 Brewster, 321; Derringer v. Plate, 29 Cal. 292, 87 Am. Dec. 170; Marshall v. Pinkham, 52 Wis. 572, 9 N. W. Rep. 615, 38 Am. Rep. 756; Congress Spring Co. v. High Rock Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; El Modello Cigar Manuf. Co. v. Gato, 28 Fla. 886, 7 So. Rep. 23, 23 Am. St. 537. See Trade-Mark Cases, 100 U. S. 82.

[2] Taylor v. Carpenter, 2 Woodb. & M. 1; Coats v. Holbrook, 2 Sandf. Ch. 586.

[3] Peltz v. Eichele, 62 Mo. 171; Morison v. Salmon, 2 M. & G. 385; Blanchard v. Hill, 2 Atk. 484; Singleton v. Bolton, 3 Doug. 293; Blofield v. Payne, 4 B. & Ad. 410; Southern v. How, Poph. 143; Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639; Taylor v. Carpenter, *supra;* Taylor v. Carpenter, 2 Sandf. Ch. 603, and note to Coats v. Holbrook, id. 599; Shaw v. Pilling, *supra;* Alexander v. Henry, 12 Rep. of Pat. Cas. 360.

[4] Alexander v. Henry, *supra.*

[5] Coats v. Holbrook, 2 Sandf. Ch. 586; Taylor v. Carpenter, id. 603 (and

he adopts a trade-mark which is untrue and deceptive to sell his own goods as the goods of another, for thereby the latter is injured and the public deceived.[1] The infringement is presumed to proceed from a fraudulent purpose to induce the public or those buying the article to believe that the goods wrongfully designated by it are those made or sold by [630] the owner of the trade-mark, and to supplant him in the goodwill of his trade.[2] Damages will be presumed from infringement, and at least a nominal sum can be recovered.[3] Positive proof of fraudulent intent on the part of the infringer is not required where the infringement is clearly shown, as his liability arises from the fact that he is enabled, through the unwarranted use of the trade-mark, to sell a simulated article as and for the one which is genuine.[4] It is sufficient to show the proprietary right of the plaintiff and its actual infringement.[5] Cases arising out of unfair competition are recognized as analogous to those in which there have been violations of trade-marks.[6]

§ 1201. The measure of damages.[7] The compensation to the owner of a trade-mark for the injury he suffers from a

note to Coats v. Holbrook, id. 599), 11 Paige, 292, 42 Am. Dec. 114.

[1] Newman v. Alvord, 51 N. Y. 195, 10 Am. Rep. 588; Morison v. Salmon, 2 M. & G. 385.

[2] Taylor v. Carpenter, 11 Paige, 292, 42 Am. Dec. 114, 2 Sandf. Ch. 603; McLean v. Fleming, 96 U. S. 245; Marsh v. Billings, 7 Cush. 322, 54 Am. Dec. 723; Thompson v. Winchester, 19 Pick. 214, 31 Am. Dec. 135; Blofield v. Payne, 4 B. & Ad. 410; Rodgers v. Nowill, 5 M., G. & S. 109; Coffeen v. Brunton, 4 McLean, 516; Shaw v. Pilling, 175 Pa. 78, 34 Atl. Rep. 446.

[3] Blofield v. Payne, 4 B. & Ad. 410; Le Page Co. v. Russia Cement Co., 51 Fed. Rep. 941, 17 L. R. A. 354.

More than nominal damages have been recovered, apart from any direct proof of loss of profits or damage to reputation. Littlejohn v. Mulligan, 3 N. Z. L. R. (Sup. Ct.) 446.

[4] McLean v. Fleming, 96 U. S. 253; Wotherspoon v. Currie, L. R. 5 Eng. & Ir. App. 512; Davis v. Kendall, 2 R. I. 566; Shaw v. Pilling, *supra;* Armington v. Palmer, 21 R. I. 109, 42 Atl. Rep. 308, 43 L. R. A. 95; Le Page Co. v. Russia Cement Co., *supra.*

[5] Colman v. Crump, 70 N. Y. 578; American Grocer v. Grocer Pub. Co., 25 Hun, 402; Dale v. Smithson, 12 Abb. Pr. 237; Guilhon v. Lindo, 9 Bosw. 605; Kinahan v. Bolton, 15 Ir. Ch. (N. S.) 75; Filley v. Fassett, 44 Mo. 168, 100 Am. Dec. 275; Stonebreaker v. Stonebreaker, 33 Md. 252; Holmes v. Holmes, etc. Manuf. Co., 37 Conn. 278, 9 Am. Rep. 324; Edelsten v. Edelsten, 9 Jur. (N. S.) 479.

[6] Lawrence Manuf. Co. v. Tennessee Manuf. Co., 138 U. S. 537, 11 Sup. Ct. Rep. 396; N. K. Fairbank Co. v. Windsor, 118 Fed. Rep. 96.

[7] See Trade-Mark Cases, 100 U. S.

wrongful and unauthorized use of it by another is ascertained and computed on substantially the same principles as damages for infringement of patents and copyrights.[1] In equity, if [631] there is ground for invoking its jurisdiction, and an infringement has been found and decreed, and there has been no unreasonable delay in commencing the suit,[2] an account of profits will be decreed, which means the net profits the infringer has actually realized.[3] Where a defendant is so or-

82, declaring the trade-mark legislation of congress unconstitutional.

[1] N. K. Fairbank Co. v. Windsor, 118 Fed. Rep. 96.

[2] Harrison v. Taylor, 11 Jur. (N. S.) 408, 12 L. T. Rep. (N. S.) 339; Amoskeag Manuf. Co. v. Garner, 4 Am. L. Times (N. S.), 176.

"In England the rule is stringent in trade-mark cases that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights if he would hold a wrong-doer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant." Sawyer v. Kellogg, 9 Fed. Rep. 601; El Modello Cigar Manuf. Co. v. Gato, 25 Fla. 886, 7 So. Rep. 23, 23 Am. St. 537. If plaintiff remains silent after he has knowledge of the infringement he will be allowed damages only on such sales as are made after his action is begun. Enoch Morgan's Sons Co. v. Troxell, 57 How. Pr. 121.

[3] Frazer v. Frazer Lubricator Co., 18 Ill. App. 450; Avery v. Meikle, 85 Ky. 435, 446, 3 S. W. Rep. 609, 7 Am. St. 604; N. K. Fairbank Co. v. Windsor, 118 Fed. Rep. 96; El Modello Cigar Manuf. Co. v. Gato, 25 Fla. 886, 7 So. Rep. 23; Hostetter v. Vowinkle, 1 Dill. 329; Wilder v. Gaylor, 1 Blatch. 511; Hennessey v. Wilmerding-Loewe Co., 103 Fed. Rep. 90; Benkert v. Feder, 34 Fed. Rep. 534.

In Hostetter v. Vowinkle, *supra*, the court seemed to limit the profits to those realized on that amount of the infringer's trade which represented the consequent diminution of the plaintiffs'. Dillon, J., said: "From the evidence of one of the defendants I find that he admits sales to the extent of two hundred dozen bottles. The evidence shows that the sales of the plaintiffs in Omaha fell off during the time the defendants were manufacturing and selling their imitation bitters even to a greater amount than this. I am satisfied that the plaintiffs' sales have been lessened at least to the extent of the two hundred dozen bottles, and that their profits would have been on each case of one dozen bottles the sum of four dollars."

If the action is for an injunction, and the complainant elects to accept the profits as damages the court will not require him to show affirmatively that he has been damaged, but will assume as matter of law that persons who have purchased simulated goods would have purchased the genuine but for the defendant's wrong. Though damages are prayed for, the election may be made to take the profits if no other special injury is alleged or claimed. Avery v. Meikle,

dered to account he cannot be charged with bad debts as profits; and, on the other hand, he cannot charge the plaintiff with the cost of manufacturing the goods in respect of which such debts were incurred.[1] If the manufacture of the article which is offered as that of another manufacturer is carried on in connection with the defendant's regular business, and the same agencies are employed in doing that which is lawful and that which is unlawful, no deduction will be made for expenses in estimating the profits of the unlawful business.[2]

85 Ky. 435, 3 S. W. Rep. 609, 7 Am. St. 604.

It is immaterial to this right of recovery whether the complainant would have realized the profits made by the defendant or not. If the latter made profits by his invasion of the complainant's rights he is entitled to them whether the same profits would have been made by him or not, and not to any more, for the same profits could not be made by both. Atlantic Milling Co. v. Rowland, 27 Fed. Rep. 24.

Interest on profits is not always allowed. Avery v. Meikle, *supra*.

In the computation of profits deduction for expenses was refused where the infringing was carried on in connection with the defendant's regular business and without increasing the gross expenses. Societe Anonyme v. Western Distilling Co., 46 Fed. Rep. 921. But see § 1191.

One who advertises and sells a proprietary article in a specified territory contrary to the terms of a contract is not liable to the other party to such contract for money expended by the latter in advertising for the purpose of counteracting the effect of such a breach. Application should be made, in the first instance, to the courts for the restraint of the party thus guilty. Equity will not, in a suit for an injunction and an accounting for the violation of such a contract, award anything for losses sustained by the complainant because of the reduction made by him in the price of his article to meet the competition of the defendant. Where the article has been made by both parties after the same formula the profits will be computed upon the basis of the actual cost to the defendant regardless of the expense at which it might have been made and sold by the defendant. Interest should be allowed on the profits. Fowle v. Park, 48 Fed. Rep. 789.

"We think it is questionable whether the cost of advertising by a complainant prior to an injunction, warning the public of the counterfeiting of his trade-mark by a respondent, can be allowed as damages properly in equity, as we understand that a complainant's right to recover is limited to the profits made by the respondent from the use of the trade-mark. Fowle v. Park, 48 Fed. Rep. 789. But, however this may be, we are clearly of the opinion that the cost of such advertisement subsequent to the granting of the injunction is not allowable." Buchanan v. Carpenter, 19 R. I. 337, 36 Atl. Rep. 90.

In Massachusetts the recovery of profits was denied where the plaintiff had not been competed with unfairly, and his loss bore no relation to the defendant's gains. Lawrence v. Hull, 169 Mass. 250, 47 N. E. Rep. 1001.

[1] Edelsten v. Edelsten, 10 L. T. Rep. (N. S.) 780.

[2] N. K. Fairbank Co. v. Windsor,

Where the trade-mark infringed belongs to several independent manufacturers the defendant should not be required to account for all the profits realized: his liability to each manufacturer is for only so much of the profits as has been diverted from him.[1] There is the same singularity of different modes of estimating and proving compensation in equity and at law as exists in case of infringement of the other rights referred to. The net profits may be recovered in equity as profits made by the use of the plaintiff's property, and the defendant, as constructive trustee, compelled to account for them. But at law only damages can be recovered, and they will be measured by the plaintiff's loss, and not by the defendant's gain; profits are there held not to be the measure of damages, nor an element thereof, where there is any other method of ascertaining and measuring them. Profits may be shown at law when necessary; they do not, however, measure the damages except as they are shown to represent loss to the plaintiff by a corresponding decrease of profits in his own business occasioned by such competition. The defendant's profits, as such, do not at law, as they do in equity, belong to the plaintiff. Nor will [632] the proof of profits warrant a legal presumption that the plaintiff's loss is a corresponding amount. Perhaps the difference comes from a claim made in the one case of damages which is properly cognizable at law, and in the other a claim of profits recoverable as the fruit of a constructive trust cognizable only in equity. On a bill in equity to restrain the infringement of the plaintiff's trade-mark a decree had been obtained for an injunction. A decree for an account of profits had been offered by the court, and refused by the plaintiff, who elected to take in lieu thereof an inquiry as to damages for the defendant's unlawful use of the trade-mark. On that inquiry the plaintiff did not prove direct damages and could not show to what extent his mark had been used; he claimed damages equal to all the profits made by the defendant on all his sales of the article on which the pirated trade-mark was used, but the court rejected this claim, holding that the plaintiff was not so entitled; that on such an inquiry the *onus* lies on

118 Fed. Rep. 96; Societe Anonyme v. Western Distilling Co., 46 id. 921.

[1] Clark Thread Co. v. William Clark Co., 56 N. J. Eq. 789, 40 Atl. Rep. 686.

him of proving some special damage by loss of custom or otherwise; and that it will not be intended, in the absence of evidence, that the amount of goods sold by the defendant by the fraudulent use of the trade-mark would otherwise have been sold by the plaintiff.[1]

§ 1202. Same subject. The jury are to give the actual [633] damages which the plaintiff has sustained,— not vindictive nor speculative damages,[2] but such as his proof has shown to their satisfaction he has actually sustained by the in- [634]

[1] Leather Cloth Co. v. Hirschfield, L. R. 1 Eq. 299; Seymour v. McCormick, 16 How. 480; Ransom v. Mayor, 1 Fish. Pat. Cas. 252; Avery v. Meikle, 85 Ky. 435, 451, 3 S. W. Rep. 609, 7 Am. St. 604; Addington v. Cullinane, 28 Mo. App. 238; Atlantic Milling Co. v. Robinson, 20 Fed. Rep. 217. See § 1185.

In Peltz v. Eichele, 62 Mo. 171, it appeared that the defendant, who was a manufacturer of and dealer in matches in the city of St. Louis, entered into a contract with the plaintiff for the sale to him, for a certain sum, of his entire factory and stock in trade, together with the goodwill, proprietary stamp, trade-marks, brands, and the use of the names of A. Eichele and A. Eichele & Co. employed by him in such business. This contract contained the following covenant: "Said Eichele, further covenanting, agrees that he will not enter into the manufacture of matches at this or any other place for the term of five years, nor lend his influence, skill, name or countenance to any other party or parties so engaged, to the detriment of the business so transferred." In about a year the defendant erected a new factory about six blocks from the one he sold to the plaintiff, and at once engaged in the manufacture and sale of matches under the name and style of P. Eichele & Co. The trial court instructed the jury that the measure of damages is not the difference of plaintiff's profits subsequent to the re-entry of the defendant into business, but only so much of this difference as was thus reaped by the defendant, and the proof of how much was thus reaped by defendant devolves on the plaintiff. That while, as part of the circumstantial proof in the cause, plaintiffs have been permitted to show their sales during the several years, the jury are not to adopt as the measure of damages the profits of one year computed on sales compared with those computed on the sales of another year, unless they believe from the evidence that the difference between the sales of the different years had no other cause than that the defendant re-entered into the business. Hence, if the jury believe from the evidence that the customers who left plaintiffs to return to defendant bought not solely of defendant, but of other parties, then the measure of damages would be only upon the sales made by defendant, and proof of this amount devolves on the plaintiff, and the jury, in the absence of proof, cannot presume what amount they were. The plaintiff having obtained a verdict and judgment on the defendant's appeal, the supreme court affirmed the judgment.

[2] These cannot be awarded by a master on an accounting in an equity suit. Hennessy v. Wilmerding-Loewe Co., 103 Fed. Rep. 90, 94.

fringement.[1] M. agreed with S., the lessee of the Revere House, to keep good carriages, horses and drivers on the arrival [635] of certain specified trains at a railroad station to convey passengers to the Revere House, and in consideration thereof S. agreed to employ M. to carry all the passengers from the Revere House to the station, and authorized him to put upon his coaches and the caps of his drivers as a badge the words "Revere House." A similar agreement, previously existing between S. and B., had been terminated by mutual consent; but B. continued to use the words "Revere House" as a badge on his coaches and on the caps of his drivers, although re-

[1] Ransom v. Mayor, etc., 1 Fish. Pat. Cas. 252; Parker v. Hulme, id. 44; Addington v. Cullinane, 28 Mo. App. 238.

Mr. Hopkins, in his Law of Unfair Trade, 241, 242, says that to his mind the better rule is announced in Warner v. Roehr, Fed. Cas. No. 17,189A, in which the instructions of Judge Blodgett to a jury were in part: "In cases of this character, where you are satisfied from the proof and from the admissions in the case that the fraud — the intention to defraud — is at the bottom of the matter, . . . the jury are not confined to exact monetary damages, but may give what are known as vindictive or exemplary damages for the purpose of deterring others from embarking in the same schemes of fraud and deception." The author says that it is not to be doubted that this doctrine is more reasonable and just, and better adapted to protect society from the ravages of trade-mark infringers than the rule stated in Taylor v. Carpenter, 2 Wood. & M. 1 Fed. Cas. No. 13,785, and Addington v. Cullinane, 28 Mo. App. 238. It is difficult to see how the result stated in those two cases has been attained. They are wholly without precedent and opposed to the rule of damages which obtained at common law. Mr. Hopkins bases his criticism, in effect, upon the ground that there is no good reason for making a distinction between the allowance of exemplary damages in cases of the character now being considered than in actions of trespass and all actions on the case for torts. So far, the editor agrees with him. Indeed, he thinks there are special reasons why such damages should be allowed. In the first place, fraud is an odious tort, and punitive damages, as is elsewhere shown, are recoverable in actions based on fraud if the aggravating circumstances authorizing their imposition are proven. In the second place, the interests of the public are much more affected by frauds of this nature than by the ordinary frauds practiced by one individual upon another, and the public health and safety may well justify the imposition of "smart money" upon those who disregard them to the extent of putting fraudulent articles of food and medicine upon the market. These considerations do not seem to have been present in the minds of the courts which have denied the recovery of such money.

Exemplary damages will not be awarded in equity. Hennessy v. Wilmerding-Loewe Co., 103 Fed. Rep. 90.

quested not to do so by S.; and his drivers called "Revere House" at the station, and diverted passengers from M.'s coaches into B.'s. In an action on the case, brought by M. against B. for using said badge and diverting passengers, it was held that M., by his agreement with S., had the exclusive right to use the words "Revere House" for the purpose of indicating that he had the patronage of that house for the conveyance of passengers; that if B. used these words for the purpose of holding himself out as having the patronage and confidence of that establishment, and in that way to induce passengers to go in his coaches rather than in M.'s, this would be a fraud on the plaintiff, and a violation of his rights, for which the action would lie without proof of actual, specific damage; and that M. would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that he had sustained, and not merely for the loss of such passengers as he could prove to have been actually diverted from his coaches to the defendant's.[1]

It has sometimes been stated and held at law that the proprietor of a trade-mark may recover the value of the illegal user while it continued, or, in other words, the amount of profits.[2] In a comparatively late case in California[3] the court, by Crockett, J., thus vindicates that measure and mode of redress: "It is clearly in proof that the defendant has made a profit of $1,770 by sale of pistols made in imitation of the Derringer pistol, and bearing Derringer's trade-mark stamped thereon without his consent; and the court rendered a judgment for this amount against the defendant. It is insisted on be- [636] half of the defendant that the profit realized by him from sale of the spurious article under the simulated trade-mark is not a proper measure of damages. It is conceded that this is the proper rule in an action for damages for the infringement of a patent. It is said that the patentee, having the exclusive right to manufacture and vend the patented article, is entitled, legally and equitably, to all the profits made by any one from the manufacture and sale of it in violation of the rights of the

[1] Marsh v. Billings, 7 Cush. 322, 54 Am. Dec. 723.

[2] Taylor v. Carpenter, 2 Woodb. & M. 1; Guyon v. Serrell, 1 Blatch. 244.

[3] Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639; N. K. Fairbank Co. v. Windsor, 118 Fed. Rep. 96.

patentee; but one who has acquired an exclusive right to use a particular trade-mark has not thereby acquired an exclusive right to make and vend the commodity to which the trade-mark is affixed; that any one has the right to make and vend the same commodity in exact imitation of that made by the owner of the trade-mark, and that the offense consists, not in imitating the commodity, but the trade-mark only. Hence, it is argued, the profit made by a sale of the commodity ought not to be a measure of the damages; but the party is entitled to only such damages as resulted from a piracy of the trade-mark; and the profit realized by a sale of the commodity does not establish the amount of this damage, which may be greater or less than the amount of the profit. It is evident that the profit realized by the wrong-doer is not the *only* measure of damages. The spurious article may have injured the credit of the genuine one, and the profits of the owner of the trade-mark may have been greatly reduced, whilst the wrong-doer has made little or no profit. But whilst the profit made by the latter does not limit the recovery, the owner of the trade-mark is entitled to all the profit which was in fact realized. In sales made under a simulated trade-mark it is impossible to decide how much of the profit resulted from the intrinsic value of the commodity in the market, and how much from the credit given to it by the trade-mark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales, and at what prices, except for the use of the trade-mark. No one will deny that on every principle of reason and justice the owner of the trade-mark is entitled to so much of the profit as resulted from the trade-mark. The difficulty lies in ascertaining what proportion of the profit is due to the trade-mark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable [637] certainty it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another so that they cannot be distinguished and separated he shall lose the whole, for the reason that the fault is his; and it is but just that he should

suffer the loss rather than an innocent party who in no way contributed to the wrong."

It has been ruled in New York that the plaintiff may recover as damages the amount received by the defendant upon sales made by him, less the sum it would have cost the former to make and sell the quantity made and sold by the defendant in addition to what he made and sold.[1] Where the circumstances connected with the sale of the spurious goods are aggravated there may be a recovery, in addition to the profits, of damages for injury to the reputation of the goods of the complainant.[2]

In New Zealand the plaintiff may sue for damages or for an account of profits; he cannot have both remedies. In an action for damages the recovery is measured by the extent to which the infringement has interfered with the plaintiff's sales,[3] including any prospective interference arising from the infringement in respect of which the action is brought. The profits received by the defendant do not measure the damages, because it does not follow that sales made by the defendant at a reduced price would have been equaled by sales at a higher price made by the plaintiff.[4] "If, however, it be proved that large sales have taken place, though at a reduced price, it is a reasonable inference that there has been a substantial interference with the plaintiff's sales, though, perhaps, not to the extent of the fraudulent sales. In the present case the defendant admits on the pleadings that he has for some time past infringed the plaintiff's trade-mark, and has sold, and has continued from time to time to sell, under the false trade-mark, pills not manufactured by the plaintiff. At the hearing the imitation was proved to be as fraudulent as possible. Although, therefore, the damages are in no way to be given as a punishment for fraud, yet it would be quite a proper direction to a jury to tell them that in such circumstances the damages should not, as the phrase is, be weighed in golden scales, and that in assessing them every inference that could fairly be

[1] Champlin v. Stoddard, 34 Hun, 109.

[2] Hennessy v. Wilmerding-Loewe Co., 103 Fed. Rep. 90, 94.

[3] Atlantic Milling Co. v. Robinson, 20 Fed. Rep. 217.

[4] Leather-Cloth Co. v. Hirschfield, L. R. 1 Eq. 299.

drawn against the defendant should be drawn. Where it is clearly proved that the plaintiff has suffered some substantial, and not merely nominal, damage from the fraudulent acts of the defendant, then, as the difficulty of proving to a nicety the exact amount of damage has been mainly caused by the acts of the defendant, a jury would be justified, as in any other action of tort, in looking at all the probabilities arising from the evidence in order to estimate the damage the plaintiff has sustained." [1]

[1] Beecham v. Hanlon, 12 N. Z. L. R. 554.

CHAPTER XXXIV.

SLANDER AND LIBEL.

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PLAINTIFF'S CASE.

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SECTION 1.

PLAINTIFF'S CASE.

§ 1203. Nature of the wrong. The wrong now to be [638] considered is one by which the wrong-doer injures the reputation of another by maliciously publishing a falsehood concerning him. The extent of the injury, and the consequent right to damages therefor, depends on how good the previous reputation of the injured party was and the nature of the false charge made against him. The law presumes, until the con-

trary is shown, that every person is innocent; that one has done nothing to forfeit the good opinion of the community, and hence enjoys its respect and confidence.[1] It regards this good reputation as valuable to its possessor, and its preservation important to his happiness.[2] The public utterance of a false accusation by which a good name is destroyed or sullied is, therefore, an injury for which damages may be recovered. Slander and libel are different names for the same wrong committed in different ways. Slander is oral defamation published without legal excuse, and libel is defamation so published by means of writing, printing, pictures, images or anything that is the object of the sense of sight.[3]

§ 1204. Accusations actionable per se. Certain vocal utterances are actionable *per se;* an action will lie for them without an allegation or proof of actual damage, because it is legally presumed that they cause injury as a natural and immediate consequence. Other utterances of a defamatory tendency are not so obviously injurious that injury therefrom is presumed. When such defamation is the subject of an action special injury must be alleged and proved to sustain the ac- [639] tion.[4] In the following cases words falsely spoken are actionable in themselves: First, where they impute to another the commission of some criminal offense involving moral turpitude, for which, if the charge is true, he may be indicted and punished; or, as the test is more generally stated, where the charge, if true, must subject the party charged to indictment for a crime involving moral turpitude, or subject him to punishment.[5] The injury from such a slander consists, not in

[1] Clark v. North American Co., 203 Pa. 346, 53 Atl. Rep. 237.

[2] Times Pub. Co. v. Carlisle, 94 Fed. Rep. 762, 36 C. C. A. 475.

[3] Cooley on Torts, 193.

[4] Cooley on Torts, 203.

[5] Pollard v. Lyon, 91 U. S. 225; Davis v. Starrett, 97 Me. 568, 55 Atl. Rep. 516; McCuen v. Ludlum, 17 N. J. L. 12; Brooker v. Coffin, 5 Johns. 188, 4 Am. Dec. 337; Anonymous, 60 N. Y. 262, 19 Am. Rep. 174; Hoag v. Hatch, 23 Conn. 585; Davis v. Brown, 27 Ohio St. 326; Hollingsworth v. Shaw, 19 id. 430, 2 Am. Rep. 411; Dial v. Holter, 6 Ohio St. 228; Montgomery v. Deeley, 3 Wis. 709; Filber v. Dautermann, 26 id. 518; Ranger v. Goodrich, 17 id. 78; Miller v. Parish, 8 Pick. 384; Dottarer v. Bushey, 16 Pa. 204; Stitzell v. Reynolds, 67 id. 54, 5 Am. Rep. 396; De Pew v. Robinson, 95 Ind. 109; Bronson v. Bruce, 59 Mich. 467, 26 N. W. Rep. 671, 60 Am. Rep. 307; Brooks v. Harrison, 91 N. Y. 83; Davis v. Sladden, 17 Ore. 259, 21 Pac. Rep. 140; Zeliff v. Jennings, 61 Tex. 458; Campbell v. Campbell, 54 Wis. 90, 11 N. W. Rep. 456; Jones v. Townsend's Adm'x, 21 Fla.

the exposure to prosecution for the implied crime, but the disgrace and loss of reputation which the law presumes to result from such imputation.[1] It makes no difference that the person of whom the words were spoken is not in the state where he is punishable; for though the crime have locality, the effect of the imputation has not.[2] Second, where the words falsely spoken of a person impute that he is infected with some contagious disease, when, if the charge is true, it would exclude him from society.[3] The charge must be such as can have the effect mentioned after the words are spoken, and, therefore, must impute the existence of the disease at the present time.[4] Third, where the words falsely spoken of a person impute to him misconduct in an office of profit,[5] or a public office of trust, though not one of profit, and regardless of whether there is a power of removal from the office for the misconduct charged against the incumbent or not,[6] or a want of fitness to perform its duties, or those which pertain to his trade or profession.[7] To render defamatory words of this latter [640] class actionable without averment or proof of special damage,

431; Griebel v. Rochester Printing Co., 60 Hun, 319, 14 N. Y. Supp. 848; Nolte v. Herter, 65 Ill. App. 430; Ransom v. McCurley, 140 Ill. 626, 31 N. E. Rep. 119; Gray v. Elzroth, 10 Ind. App. 587, 37 N. E. Rep. 551; Walker v. Wickens, 49 Kan. 42, 30 Pac. Rep. 181; Savoie v. Scanlan, 43 La. Ann. 967, 9 So. Rep. 916; Taylor v. Ellington, 46 La. Ann. 371, 15 So. Rep. 499, 26 Am. St. 200; Gaines v. Belding, 56 Ark. 100, 19 S. W. Rep. 236; Tottleben v. Blankenship, 58 Ill. App. 47; Upchurch v. Robertson, 127 N. C. 127, 37 S. E. Rep. 157; Hulbert v. New Nonpareil Co., 111 Iowa, 490, 82 N. W. Rep. 928; Pokrok Zapadu Pub. Co. v. Zizovsky, 42 Neb. 64, 60 N. W. Rep. 358; Gomez v. Hawaiian Gazette Printing Co., 10 Hawaiia, 108.

[1] Rea v. Harrington, 58 Vt. 181, 2 Atl. Rep. 475, 56 Am. Rep. 561; Cooley on Torts, 200; Davis v. Brown, 27 Ohio St. 326.

[2] Shipp v. McCraw, 3 Murph. 463, 9 Am. Dec. 611.

[3] Pollard v. Lyon, 91 U. S. 225; Feise v. Linder, 3 B. & P. 374, note *a*.

[4] Taylor v. Hall, 2 Str. 1189; Bruce v. Soule, 69 Me. 566; Williams v. Holdredge, 22 Barb. 396; Carslake v. Mapledoram, 2 T. R. 473; Nichols v. Guy, 2 Ind. 82; Kancher v. Blinn, 29 Ohio St. 62, 23 Am. Rep. 727; Irons v. Field, 9 R. I. 216.

[5] Alexander v. Jenkins, [1892] 1 Q. B. 797; Nehrling v. Herold Co., 112 Wis. 558, 88 N. W. Rep. 614.

[6] Booth v. Arnold, [1895] 1 Q. B. 571, in the court of appeal.

[7] Pollard v. Lyon, 95 U. S. 225; Camp v. Martin, 23 Conn. 86; Sumner v. Utley, 7 id. 258; Jones v. Diver, 22 Ind. 184; McMillan v. Birch, 1 Bin. 178, 2 Am. Dec. 426; Lewis v. Hawley, 2 Day, 495, 2 Am. Dec. 121; Burtch v. Nickerson, 17 Johns. 217, 8 Am. Dec. 390; Hogg v. Dorrah, 2 Port. 212; Hayner v. Cowden, 27 Ohio St. 292; Goodenow v. Tappan, 1 Ohio, 38; Chaddock v. Briggs, 13 Mass. 248; Hartley v. Herring, 8 T. R.

they must apply to the party defamed in respect to his office or employment, or to his conduct relative thereto, and be calculated to prejudice him in an office of which he is an incum- [641] bent, or a profession or calling in which he is engaged.[1]

130; Craig v. Brown, 5 Blackf. 44; Gove v. Blethen, 21 Minn. 80, 18 Am. Rep. 380; Robbins v. Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152; Oram v. Franklin, 5 Blackf. 42; Lansing v. Carpenter, 9 Wis. 540, 76 Am. Dec. 280; Lindsey v. Smith, 7 Johns. 359; Forward v. Adams, 7 Wend. 204; Secor v. Harris, 18 Barb. 425; Carrol v. White, 33 id. 615; Rice v. Cottrel, 5 R. I. 340; Garr v. Selden, 6 Barb. 416; Ayre v. Craven, 2 Ad. & El. 7; Gallwey v. Marshall, 24 Eng. L. & Eq. 463; Frolich v. McKiernan, 84 Cal. 177, 24 Pac. Rep. 114; Franklin v. Browne, 67 Ga. 272; Clifford v. Cochrane, 10 Ill. App. 570; Blumhart v. Rohr, 70 Md. 328, 17 Atl. Rep. 266; Pratt v. Pioneer Press Co., 32 Minn. 217, 18 N. W. Rep. 836, 20 id. 87; Cotulla v. Kerr, 74 Tex. 89, 11 S. W. Rep. 1058, 15 Am. St. 819; Larrabee v. Minnesota Tribune Co., 36 Minn. 141, 39 N. W. Rep. 462; Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. Rep. 457; Lovejoy v. Whitcomb, 174 Mass. 586, 55 N. E. Rep. 322; St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. 502, 28 S. W. Rep. 851; Bray v. Callihan, 155 Mo. 43, 55 S. W. Rep. 865; Gideon v. Dwyer, 87 Hun, 246, 33 N. Y. Supp. 754; Bank v. Bowdre, 92 Tenn. 723, 23 S. W. Rep. 131; Brown v. Vannaman, 85 Wis. 451, 39 Am. St. 860, 55 N. W. Rep. 183; Hanchett v. Chiatovich, 101 Fed. Rep. 742, 41 C. C. A. 648; Tonini v. Cevasco, 114 Cal. 266, 46 Pac. Rep. 103; Brown v. Holton, 109 Ga. 431, 34 S. E. Rep. 717; Gerald v. Inter Ocean Pub. Co., 90 Ill. App. 205; Norfolk & W. Steamboat Co. v. Davis, 12 D. C. App. Cas. 306; Schomberg v. Walker, 132 Cal. 224, 64 Pac. Rep. 290; Krug v. Pitass, 162 N. Y. 154, 56 N. E. Rep. 526, 76 Am. St. 317; Freisinger v. Moore, 65 N. J. L. 286, 47 Atl. Rep. 432; Jones v. Roberts, 73 Vt. 201, 50 Atl. Rep. 1071; Wofford v. Meeks, 129 Ala. 349, 30 So. Rep. 625.

[1] Bellamy v. Burch, 16 M. & W. 590; Forward v. Adams, 7 Wend. 204; Edwards v. Howell, 10 Ired. 211; Allen v. Hillman, 12 Pick. 101; Orr v. Skofield, 56 Me. 483; Whittemore v. Weiss, 33 Mich. 348; Backus v. Richardson, 5 Johns. 476; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. Rep. 270; Gattis v. Kilgo, 128 N. C. 402, 38 S. E. Rep. 931.

The test to bring a case within the first class is arbitrary, and appears to have been adopted for the purpose of having a fixed and precise rule. It is worthy of notice that notwithstanding it is desirable to have a definite rule, the law determines the actionable character of other slanders and of libel from their intrinsic nature. It authorizes the court to hold any matter libelous and actionable *per se* when the imputation is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or exclusion from society, So of other kinds of slander; they are actionable *per se* if injurious to one in his office, trade or profession, or tend to exclude him from society for having an infectious disease. Their intrinsic character and injurious tendency are recognized and determined by the court. But when the words, falsely spoken, impute to him pestilent or flagrant immorality, no matter how gross or outrageous, if not made a crime, indictable and punishable in the temporal courts, they are not legally presumed to be in-

The wrong done by libel is like that done by slander; but it is defamation communicated and published in a form and manner which implies more deliberation, and is likely to be more widely disseminated and more lasting in detrimental effect. For this reason there is broader scope of libelous matter which is actionable *per se;* the law will presume damage from less serious matter when thus published than when orally uttered. Though no special damage is alleged, [642] and no averments of such extrinsic facts as might be requisite to make the publication in question import a charge of crime are made, the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence and social intercourse.[1] The nature of the charge must be such that the

jurious, although the judge who so declares the law and every juror who must follow it as so declared, knows as a man that the imputation, to the extent that it is believed, will render the defamed party odious, subject him to contempt and tend to exclusion from decent society. Davis v. Brown, 27 Ohio St. 326, is an illustration of the severe arbitrariness of the test referred to. See Malone v. Stewart, 15 Ohio, 319, 45 Am. Dec. 577.

This principle is not strictly applied to clergymen. See Potter v. New York Evening Journal Pub. Co., 68 App. Div. 95, 74 N. Y. Supp. 317.

[1] Tillson v. Robbins, 68 Me. 298, 28 Am. Rep. 50; State v. Smily, 37 Ohio St. 33, 41 Am. Rep. 487; Watson v. Trask, 6 Ohio, 531, 27 Am. Rep. 271; Tappan v. Wilson, 7 Ohio, 190; Smart v. Blanchard, 42 N. H. 151; Price v. Whitely, 50 Mo. 439; Lindley v. Horton, 27 Conn. 58; Cary v. Allen, 39 Wis. 481; Atwill v. Mackintosh, 120 Mass. 177; Hand v. Winton, 38 N. J. L. 122; Cramer v. Noonan, 4 Wis. 231; Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Montgomery v. Knox, 23 Fla. 595, 3 So. Rep. 211; Jones v. Greeley, 25 Fla. 629, 6 So. Rep. 448; Republican Pub. Co. v. Conroy, 5 Colo. App. 262, 38 Pac. Rep. 423; Prussing v. Jackson, 85 Ill. App. 324; Weil v. Israel, 42 La. Ann. 955, 8 So. Rep. 826; Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N. E. Rep. 275; Peterson v. Western U. Tel. Co., 65 Minn. 18, 33 L. R. A. 302, 67 N. W. Rep. 646; Byram v. Aiken, 65 Minn. 87, 67 N. W. Rep. 807; Martin v. Paine, 69 Minn. 482, 72 N. W. Rep. 450; Ferguson v. Evening Chronicle Pub. Co., 72 Mo. App. 462; Winchell v. Argus Co., 69 Hun, 354, 23 N. Y. Supp. 650; Rider v. Rulison, 74 Hun, 239, 26 N. Y. Supp. 234; Hollingsworth v. Spectator Co., 49 App. Div. 16, 63 N. Y. Supp. 2; Thomas v. Bowen, 29 Ore. 258, 45 Pac. Rep. 768; Belo v. Fuller, 84 Tex. 450, 31 Am. St. 75, 19 S. W. Rep. 616, citing the text; State v. Keenan, 111 Iowa, 286, 82 N. W. Rep. 792; Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N. E. Rep. 692, 13 L. R. A. 864; Taylor v. Hearst, 107 Cal. 262, 269, 40 Pac. Rep. 392; Randall v. Evening News Ass'n, 101 Mich. 561, 60 N. W. Rep. 301; Sanders v. Hall, 22 Tex. Civ. App. 282, 55 S. W. Rep. 594; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac.

court can legally presume that the plaintiff has been disgraced in the estimation of his acquaintances or of the public, or has suffered some other loss either in his property, character or business, or in his domestic or social relations in consequence of the publication.[1] In the case of one holding an office it is not necessary that he be in office at the time the publication was made.[2] Whether the alleged defamatory matter is actionable *per se* or not is a question for the court.[3]

§ 1205. Malice the gist of the action. Malice, which is said to be the gist of an action for libel and verbal slander, does not mean malice or ill-will towards the individual affected in the usual sense of the term. In ordinary cases of slander the term "maliciously" means intentionally and wrongfully, without any legal ground of excuse. Malice is an implication of law from the false and injurious nature of the charge, and differs from actual malice and ill-will towards the individual frequently given in evidence to enhance the damages.[4] If a plaintiff has been injured in his character or feelings by an unauthorized publication it is the duty of a jury to award him full compensation in damages without reference to any particular ill-will entertained against him by the defendant. Actual ill-will or malice will enhance the damages and may be shown for that purpose except, of course, where exemplary damages are not allowable,[5] but need not be shown to entitle the plaintiff to recover,[6] except in cases in which

Rep. 1051; Merchants' Ins. Co. v. Buckner, 98 Fed. Rep. 222, 39 C. C. A. 19; Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 574, 41 S. W. Rep. 381; Schomberg v. Walker, 132 Cal. 224, 64 Pac. Rep. 290; Alwin v. Liesch, 86 Minn. 281, 90 N. W. Rep. 404.

[1] Stone v. Cooper, 2 Denio, 299, 43 Am. Dec. 740; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. Rep. 358, 38 Am. St. 592, 20 L. R. A. 138; Bee Pub. Co. v. World Pub. Co., 59 Neb. 713, 82 N. W. Rep. 28.

[2] Sharpe v. Larson, 67 Minn. 428, 70 N. W. Rep. 1; Pratt v. Pioneer Press Co., 32 Minn. 217, 18 N. W. Rep. 836.

[3] Wagaman v. Byers, 17 Md. 183; Hume v. Arrasmith, 1 Bibb, 165, 4 Am. Dec. 626; Sharpe v. Larson, *supra;* Bank v. Bowdre, 92 Tenn. 723, 23 S. W. Rep. 131; Gerald v. Inter Ocean Pub. Co., 90 Ill. App. 205.

[4] King v. Root, 4 Wend. 113, 21 Am. Dec. 102; Times Pub. Co. v. Carlisle, 94 Fed. Rep. 762, 36 C. C. A. 475; Wright v. Gregory, 9 App. Div. 85, 41 N. Y. Supp. 139; Young v. Fox, 26 App. Div. 261, 49 N. Y. Supp. 634.

[5] Bee Pub. Co. v. World Pub. Co., 59 Neb. 713, 82 N. W. Rep. 28.

[6] Cases cited in next to the last preceding note; Casey v. Hulgan, 118 Ind. 590, 21 N. E. Rep. 322; Wabash Printing & P. Co. v. Crumrine, 123 Ind. 89, 21 N. E. Rep. 904; Wynne

the communication complained of is privileged, then express malice must be averred and proved.[1] A corporation may entertain the express malice necessary to render it liable for the publication of a libel;[2] such malice may be shown by evidence of the falsity of the publication, and a repetition of it after notice thereof,[3] or by refusing to publish a retraction, cause for so doing being shown.[4] Where a charge made in a pleading is libelous, proof of malice, aside from that afforded by the charge and the circumstances under which it was made, is unnecessary.[5]

[643] § **1206. General damages, how proven.** There is no legal measure of damages in actions for these wrongs. The amount which the injured party ought to recover is referred [644] to the sound discretion of the jury. The damages are intended to repair the injury done; and all that the law can determine in a given case is what facts proved may be taken [645] into account, and what are fair considerations to influence the jurors' judgments. They are to consider the plaintiff's injured feelings and tarnished reputation, taking into account

v. Parsons, 57 Conn. 73, 17 Atl. Rep. 362; Langton v. Hagerty, 35 Wis. 150; Wilson v. Noonan, id. 349; Griebel v. Rochester Printing Co., 60 Hun, 319, 14 N. Y. Supp. 848; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. Rep. 161, 20 Am. St. 730, 9 L. R. A. 621; Childers v. San Jose Mercury Printing & Pub. Co., 105 Cal. 284, 38 Pac. Rep. 903, 45 Am. St. 40; Taylor v. Hearst, 107 Cal. 262, 40 Pac. Rep. 392, 118 Cal. 366, 50 Pac. Rep. 541; Gilman v. McClatchy, 111 Cal. 606, 44 Pac. Rep. 241; Nailor v. Ponder, 1 Marvel, 408, 41 Atl. Rep. 88; Gray v. Elzroth, 10 Ind. App. 587, 37 N. E. Rep. 551, 53 Am. St. 400; Owen v. Dewey, 107 Mich. 67, 65 N. W. Rep. 8; Austin v. Hyndman, 119 Mich. 615, 78 N. W. Rep. 663; Callahan v. Ingram, 122 Mo. 355, 369, 43 Am. St. 583, citing the text; Holmes v. Jones, 147 N. Y. 59, 41 N. E. Rep. 409, 49 Am. St. 646; Van Ingen v. Star Co., 1 App. Div. 429, 37 N. Y. Supp. 114, affirmed without opinion, 157 N. Y. 695; Krug v. Pitass, 162 N. Y. 154, 56 N. E. Rep. 526, 76 Am. St. 317; Moore v. Leader Pub. Co., 8 Pa. Super. Ct. 152; Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. Rep. 403; Republican Pub. Co. v. Mosman, 15 Colo. 399, 410, 24 Pac. Rep. 1051, citing the text; Washington Gas Light Co. v. Lansden, 9 D. C. App. Cas. 508.

[1] Wilson v. Noonan, 35 Wis. 349; Galtis v. Kilgo, 128 N. C. 402, 38 S. E. Rep. 931; Henry v. Moberly, 6 Ind. App. 490, 33 N. E. Rep. 981, 23 Ind. App. 305, 51 N. E. Rep. 497.

[2] Missouri Pacific R. Co. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. Rep. 384.

[3] Id.; Schomberg v. Walker, 132 Cal. 224, 64 Pac. Rep. 290; Botsford v. Chase, 108 Mich. 432, 66 N. W. Rep. 325.

[4] Clark v. North American Co., 203 Pa. 346, 53 Atl. Rep. 237.

[5] Union Mut. L. Ins. Co. v. Thomas, 83 Fed. Rep. 803, 28 C. C. A. 96.

the nature of the imputation, the extent of its publicity, the character, condition and influence of the parties.[1] Where the [646] publication is actionable *per se* the legal presumption of damage goes to the jury, and they, in view of the particular circumstances of the case, are required, in the exercise of their

[1] Belck v. Belck, 97 Ind. 73; Belo v. Wren, 63 Tex. 686, 727; Bradley v. Cramer, 66 Wis. 297, 28 N. W. Rep. 372; Davis v. Shepstone, L. R. 11 App. Cas. 187; Henderson v. Fox, 83 Ga. 233, 9 S. E. Rep. 839; Littlejohn v. Greeley, 13 Abb. 41; Fulkerson v. George, 3 id. 75; Flint v. Clark, 13 Conn. 361; Markham v. Russell, 12 Allen, 573, 90 Am. Dec. 169; Childers v. San Jose Mercury Printing & Pub. Co., 105 Cal. 284, 38 Pac. Rep. 903, 45 Am. St. 40; Sanders v. Hall, 22 Tex. Civ. App. 282, 55 S. W. Rep. 594; Turner v. Stevens, 8 Utah, 75, 30 Pac. Rep. 24, quoting the text; Fenstermaker v. Tribune Pub. Co., 13 Utah, 532, 45 Pac. Rep. 1097, 35 L. R. A. 611, citing the text; Pellardis v. Journal Printing Co., 99 Wis. 156, 74 N. W. Rep. 99; Smith v. Sun Printing & Pub. Ass'n, 55 Fed. Rep. 240, 5 C. C. A. 91; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. Rep. 752; Smith v. Times Co., 4 Pa. Dist. Rep. 399; Arnold v. Sayings Co., 76 Mo. App. 159; Cranfill v. Hayden, 22 Tex. Civ. App. 656, 669, 55 S. W. Rep. 805, citing the text; Hacker v. Hainey, 111 Wis. 313, 87 N. W. Rep. 249.

It is erroneous to give instructions which leave the jury entirely at large on the question of damages, as to direct them to give such as the plaintiff is entitled to. True v. Plumley, 36 Me. 466; Rose v. Story, 1 Pa. 190, 44 Am. Dec. 121. And also to tell them to arrive at the question by bringing it home to themselves and testing it by the sum they would be willing to take as compensation for such a wrong. Prescott v. Tousey, 50 N. Y. Super. Ct. 12.

Proof of malice in fact authorizes an increase of the damages. True v. Plumley, 36 Me. 466.

In Burt v. McBain, 29 Mich. 260, which was slander by imputing to the plaintiff, a female, a want of chastity, these instructions were approved on error: "You should consider whether there is any evidence showing express, positive malice on the part of the plaintiff. If you were satisfied by the testimony in the case that she was governed in the utterance of these words by actual, existing malice, then the compensation or award of damages should be higher and more severe than if you were satisfied that the words were uttered without any express malice. If they were thoughtlessly uttered, without due consideration of the import of the words, without any intent to injure the plaintiff — if there is no express malice proven in the case to your satisfaction, you should give less damages than you would if it is proved. You should take another matter into consideration in fixing the amount of damages. Satisfy your minds before fixing upon the amount whether this defendant originated this story herself, or whether she simply repeated what she heard. If she originated the story, and it is false; if it was the outgrowth of a wicked heart; if it is the offspring of her own brain; the coinage of her own mind,— her guilt would be greater than it would be if she received it from some one else, and simply gave it further circulation thoughtlessly, without any design to injure, without any intent to wrong. The proof upon this point you should carefully con-

judgment, to determine what sum will afford proper rep- [647]
aration.[1] To enable the jury justly to determine the amount of damages it is important to know what effect can and should be given to the speaking or publishing the same defamatory charges at other times than those stated in the declaration. Such unalleged repetitions are generally allowed to be proved;[2] but in certain states they are to be considered only as evidence of malice in the speaking or publication charged, and cannot themselves be the ground of additional damages except as they increase the injury by showing greater malice than would otherwise be implied.[3] For this purpose it is held no objection to

sider, and see to it that your verdict is not as light in the one case as it would be in the other."

In Knowlden v. Guardian Printing & Pub. Co., 55 Atl. Rep. 287, the New Jersey court of errors and appeals approved a charge in favor of a female whose virtue had been assailed to the effect that the courts would feel the same sense of shame and mortification as the plaintiff felt when the publication was first made if a verdict for six cents was returned. "It would be an utter disgrace to the administration of law to say that such a publication, such a damage to reputation, such an invasion of feelings, was to be compensated for by six cents. It is your duty in this case to see that she has substantial compensation for this grievous wrong."

[1] Newman v. Stein, 75 Mich. 402, 42 N. W. Rep. 956, 13 Am. St. 447; Meyer v. Press Publishing Co., 46 N. Y. Super. Ct. 127; Miles v. Harrington, 8 Kan. 425; Pool v. Devers, 30 Ala. 672; Alley v. Neeley, 5 Blackf. 200; Herrick v. Lapham, 10 Johns. 281; Rogers v. Fitzgerald, 72 Conn. 731, 43 Atl. Rep. 551; Taylor v. Hearst, 107 Cal. 262, 40 Pac. Rep. 392; Forke v. Homann, 14 Tex. Civ. App. 670, 39 S. W. Rep. 210; Belo v. Fuller, 84 Tex. 450, 19 S. W. Rep. 616, 31 Am. St. 75.

If the libel is against the official character of the plaintiff the damages may include compensation for all injury proximately resulting to him as an officer, but not for consequences disconnected from his official character. Cotulla v. Kerr, 74 Tex. 89, 11 S. W. Rep. 1058, 15 Am. St. 819.

Where the slander imputed want of chastity to a woman and the words were spoken in the presence of but four persons, all members of the plaintiff's family, the court refused to disturb a verdict for nominal damages. Estes v. Estes, 75 Me. 478.

[2] Leonard v. Pope, 27 Mich. 148; Gambrill v. Schooley, 95 Md. 260, 52 Atl. Rep. 500; Barlow v. Brands, 15 N. J. L. 248; Cavanagh v. Austin, 42 Vt. 576; Stearns v. Cox, 17 Ohio, 590; State v. Jeandell, 5 Harr. 475; Elliott v. Boyles, 31 Pa. 65; Johnson v. Brown, 57 Barb. 118; Alpin v. Morton, 21 Ohio St. 536; Delegall v. Highley, 8 C. & P. 444; Perry v. Breed, 117 Mass. 155; Severance v. Hilton, 32 N. H. 289; Hansbrough v. Stinnett, 25 Gratt. 495; Harman v. Cundiff, 82 Va. 239, 245; Preston v. Frey, 91 Cal. 107, 27 Pac. Rep. 533; Hacker v. Heiney, 111 Wis. 313, 319, 87 N. W. Rep. 249; Davis v. Starrett, 97 Me. 568, 55 Atl. Rep. 516.

[3] Ward v. Dick, 47 Conn. 300, 36 Am. Rep. 75; McAlmont v. McClel-

the proof of words not charged in the declaration that they [648] have been charged and recovered for in a previous action,[1] are words for which an action is barred by the statute of limitations,[2] or were spoken after the commencement of the action.[3]

§ 1207. **Same subject.** In Connecticut it is also held that of this nature is the allegation in the plea of the truth of the charge by way of justification made for the purpose of spreading and perpetuating the slander; it is only to be considered as so much more evidence of malice in the original speaking.[4] On this theory each utterance or publication of the same charge must be regarded as a distinct wrong; but in practice it must be difficult, where there is a succession of suits, to prevent double recoveries for the same wrong if all the repetitions of the same charge may be proved in each case. In other states and in England such testimony is admitted without restriction to increase damages. All the utterances of the same charge constitute one slander, as all the copies of a newspaper containing a libel constitute one publication. The frequency of the utterances or the number of the issues of a newspaper may be shown to prove the extent of publicity given to the de-

land, 14 S. & R. 359; Robbins v. Fletcher, 101 Mass. 115; Meyer v. Bohlfing, 44 Ind. 238; McGlemery v. Keeler, 3 Blackf. 488; Vanderveer v. Sutphin, 5 Ohio St. 294; Baldwin v. Soule, 6 Gray, 321; Hinkle v. Davenport, 38 Iowa, 355; Ellis v. Lindley, id. 461; Beardsley v. Bridgman, 17 id. 290; Chamberlin v. Vance, 51 Cal. 75; Parmer v. Anderson, 33 Ala. 78; Trabue v. Mays, 3 Dana, 138, 28 Am. Dec. 61; Adkins v. Williams, 23 Ga. 222; Symonds v. Carter, 32 N. H. 458; Markham v. Russell, 12 Allen, 573, 90 Am. Dec. 169; Casey v. Hulgan, 118 Ind. 590, 21 N. E. Rep. 322; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715; Hastings v. Stetson, 130 Mass. 76; Lanius v. Druggist Pub. Co., 20 Mo. App. 12; Zeliff v. Jennings, 61 Tex. 458; Letton v. Young, 2 Met. (Ky.) 558; Grace v. McArthur, 76 Wis. 641, 651, 45 N. W. Rep. 518; Rea v. Harrington, 58 Vt. 181, 2 Atl. Rep. 475, 56 Am. Rep. 561; Larrabee v. Minnesota Tribune Co., 36 Minn. 141, 30 N. W. Rep. 462; Enos v. Enos, 135 N. Y. 609, 32 N. E. Rep. 123.

[1] Swift v. Dickerman, 31 Conn. 285.

[2] Harmon v. Harmon, 61 Me. 233; Throgmorton v. Davis, 4 Blackf. 174; Lincoln v. Chrisman, 10 Leigh, 338.

[3] Beardsley v. Bridgman, 17 Iowa, 290; Schrimper v. Heilman, 24 Iowa, 505; Parmer v. Anderson, 33 Ala. 78; Hinkle v. Davenport, 38 Iowa, 355; Bodwell v. Swan, 3 Pick. 376; Ellis v. Lindley, 38 Iowa, 461; McAlmont v. McClelland, 14 S. & R. 359; Smith v. Wyman, 16 Me. 13; Norris v. Elliott, 39 Cal. 72; Baldwin v. Soule, 6 Gray, 321; Thompson v. Bowers, 1 Doug. 321; McIntire v. Young, 6 Blackf. 496, 39 Am. Dec. 443.

[4] Ward v. Dick, 47 Conn. 300, 36 Am. Rep. 75.

famatory charge; but only one recovery is allowed.[1] In one case[2] a newspaper containing a libel had been published more than six years before suit and the case was made out by the purchase of a single copy within that period, and the court refused to confine the damages to the injury arising out of the publication of that copy. In Barwell v. Adkins[3] suit was brought on a libelous article published in a newspaper, and on the trial the judge allowed proof of a second article published afterwards, reasserting the same charges, and told the jury to take both paragraphs with them "and give the plaintiff such damages as they considered he was entitled to under the [649] circumstances."[4] In Root v. Lowndes[5] Bronson, J., said: "When the plaintiff does not go beyond the words laid in the declaration I see no reason why he may not show that these words have been spoken on a dozen different occasions, although there may be but one count in the declaration. If the defendant has told twenty persons at as many different times that the plaintiff is a thief, it cannot be necessary to insert twenty counts, precisely alike, for the purpose of enabling the plaintiff to prove all the conversations, allowing the proof can work no injury to the defendant. He is advised by the declaration what words the plaintiff intends to give in evidence, and whether all the different occasions of speaking them are proved or not the judgment will be a bar to another action."[6] An action for libel was held barred by a judgment in an action for malicious prosecution, the arrest being made under papers containing the libelous matter.[7] The legal theory is that a verdict for the plaintiff vindicates his character; hence where

[1] Fry v. Bennett, 28 N. Y. 324; Gathercole v. Miall, 15 M. & W. 319; Defries v. Davis, 7 C. & P. 112; Rosewater v. Hoffman, 24 Neb. 222, 38 N. W. Rep. 857; Whitney v. Moignard, 24 Q. B. Div. 630; Bigelow v. Sprague, 140 Mass. 425, 5 N. E. Rep. 144.

[2] Brunswick v. Harmer, 14 Q. B. 185.

[3] 1 Man. & Gr. 807.

[4] Leonard v. Pope, 27 Mich. 148, 149.

[5] 6 Hill, 518, 41 Am. Dec. 762.

[6] Campbell v. Butts, 3 N. Y. 174; Howard v. Sexton, 4 id. 157; Wallis v. Mease, 3 Bin. 546; Kean v. McLaughlin, 2 S. & R. 469; Hansbrough v. Stinnett, 25 Gratt. 495.

[7] Rockwell v. Brown, 36 N. Y. 207. In Leonard v. Pope, *supra*, Campbell, J., said: "This principle appears just and sensible, and avoids the difficulty of drawing intangible distinctions which no jury can appreciate, between allowing testimony of repetition of wrongs to bear upon an important element in a case, and yet not allowing damages except for the original wrongful act independent of the wrong done by the repetition.

injury thereto is the only ground of damage there cannot be a recovery for prospective damage which may be claimed as the result of the words which formed the basis of the action.[1] Compensatory damages do not include the expense of the plaintiff and compensation for his trouble in carrying on his action.[2]

§ 1208. Same subject; aggravation of damages. Repetitions of the same slander or libel are so far distinct wrongs that if repeated after suit brought a new action lies as for a fresh injury; and such repetitions are not admissible for any purpose in the first action.[3] Nor are other slanders or libels [650] than those alleged in the declaration provable for the purpose of showing malice, even with a caution not to allow additional damages for them, for they would imperceptibly influence the judgment of the jury, and thus the defendant might be twice subjected to damages for the same wrong.[4] A

Such niceties are not to be favored, and should not be introduced where they can be avoided. It was only the accident of calling one witness before another that would have prevented any one of the slanders proven to have stood as the one to which the defendant claims the recovery should be confined. Any one of them would have made out a cause of action under the declaration. A justification of one would have answered them all. A future action for any of them is therefore barred."

[1] Bradley v. Cramer, 66 Wis. 297, 28 N. W. Rep. 372; Halstead v. Nelson, 24 Hun, 395.

[2] Indianapolis Journal Newspaper Co. v. Pugh, 6 Ind. App. 510, 527, 33 N. E. Rep. 991; Grotius v. Ross, 24 Ind. App. 543, 57 N. E. Rep. 46.

[3] Frazier v. McCloskey, 60 N. Y. 337, 19 Am. Rep. 193; Daly v. Byrne, 77 N. Y. 182; Woods v. Pangburn, 75 id. 495; Keenholtz v. Becker, 3 Denio, 346; Howell v. Cheatham, Cooke, 247; Eccles v. Radam, 75 Hun, 535, 27 N. Y. Supp. 486; Cassidy v. Brooklyn Daily Eagle, 138 N. Y. 239, 33 N. E. Rep. 1038; Upton v. Hume, 24 Ore. 420, 435, 33 Pac. Rep. 810, 21 L. R. A. 493, 41 Am. St. 863; Barker v. Prizer, 150 Ind. 4, 48 N. E. Rep. 4; Underwood v. Smith, 93 Tenn. 687, 27 S. W. Rep. 1008, 42 Am. St. 946.

[4] Root v. Lowndes, 6 Hill, 520, 521, 41 Am. Dec. 762; Thomas v. Croswell, 7 Johns. 264, 5 Am. Dec. 269; Finnerty v. Tipper, 2 Camp. 72; Conant v. Leslie, 85 Me. 257, 27 Atl. Rep. 147; Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cush. 133; Commonwealth v. Damon, 136 Mass. 441, 448; Mix v. Woodward, 12 Conn. 262.

In Howard v. Sexton, 4 N. Y. 161, Gardiner, J., said: "It has sometimes been argued that proof of this character shows general malice upon the part of the defendant, which may properly enhance the damages against him. So would evidence that he had set fire to the house of the plaintiff, or committed battery upon his person, furnish stronger proof of general malice than mere words, however opprobrious. The principle does not stop with proof of

different view has been expressed by the circuit court of appeals, sixth circuit, Judges Taft, Lurton and Ricks sitting, and Judge Taft writing the opinion. The rule declared was that a prior or contemporaneous publication in another newspaper owned by the defendant is competent evidence on the question of malice, although a separate suit is pending thereon. "By the weight of authority, prior and contemporaneous publications of the same libel, other than that declared on, are competent evidence to show malice, whether such publications may themselves be made the basis of recovery in separate suits or not; and the danger of a double recovery for the same publication is to be avoided by a caution from the court that damages are to be allowed only for the article sued on."[1] But if the circumstances are such that a double liability does not exist the reiteration of a libel or slander after suit brought may be proved on the question of malice and damages. No case holds that such a repetition is in its nature not competent evidence on the question, and whenever it has been excluded on that question it has always been upon the ground that it was an independent cause of action.[2]

different words, but extends to the whole conduct of the defendant. Some of the adjudged cases certainly seem to go this length. Finnerty v. Tipper, 2 Camp. 72; 2 Stark. Ev. 635, note A. And if the proposition we are considering is sound they were rightly decided. But the modern, and I think the better, doctrine is that the action for slander was not designed to punish the defendant for general ill-will to his neighbor, but to afford the plaintiff redress for a specific injury. To constitute that injury malice must be proved, not mere general ill-will, but malice in the special case set forth in the pleadings to be inferred from it and the attending circumstances. The plaintiff may show a repetition of the charge for which the action is brought, but not a different slander for any purpose; and if such evidence is received without objection, with a view to establish malice, the plaintiff may, notwithstanding, bring a subsequent action for the same words, and recover. Root v. Lowndes, 6 Hill, 519, 41 Am. Dec. 762; Campbell v. Butts, 3 N. Y. 174;" Medaugh v. Wright, 27 Ind. 137; Fry v. Bennett, 28 N. Y. 328; Barr v. Hack, 46 Iowa, 308.

[1] Post Pub. Co. v. Hallam, 59 Fed. Rep. 530, 8 C. C. A. 201, citing Van Derveer v. Sutphin, 5 Ohio St. 593; Peason v. Lemaitre, 5 Mann. & G. 700; Chamberlin v. Vance, 51 Cal. 75; Shock v. McChesney, 2 Yeates, 473; Gibson v. Cincinnati Enquirer, 2 Flip. 121. This is in accord with the rule in California. Hearne v. De Young, 119 Cal. 670, 677, 52 Pac. Rep. 150, and local cases cited.

[2] Per Earl, J., in Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. Rep. 1009.

It has been held that the fact that the defendant, after he had once been sued for slander and admitted liability for it by settling the suit, deliberately uttered it again is strong evidence to warrant punitive damages, if the jury think proper to award them.[1] Damages will be increased by every circumstance which aggravates the wrong and adds to the injury. Repetition of a slander does this in two ways: by giving larger publicity to defamation, and by evincing greater malice. There is a conclusive presumption of malice from falsely speaking words actionable in themselves unless a legal justification or excuse is shown. The malicious intent of the perpetrator of a slander or libel is not a question of fact; it is a conclusion of [651] law; being so, the plaintiff is not required to prove it except by showing the publication of the defamatory matter; nor can the defendant deny or disprove it as a separate element of the wrong.[2] This is malice in law, but it is nevertheless a bad intent assumed to exist in fact. As the injury will be aggravated by showing more malice than the law implies from mere proof of the defamation alleged, the plaintiff may prove any circumstances which tend to magnify the malice; they will tend not only to confirm as true in fact what the law so presumes, but they may also show that the wrong and injury did not result from mere heedless and aimless gossip, but a malevolent eagerness to inflict pain and destroy reputation by originating or giving currency to a conscious fabrication.[3]

[1] Glanders v. Graff, 25 Hun, 553.

[2] Fry v. Bennett, 1 Code Rep. (N. S.) 243, 5 Sandf. 54; Littlejohn v. Greeley, 13 Abb. 55; Weaver v. Hendrick, 30 Mo. 502; Sanderson v. Caldwell, 45 N. Y. 308, 6 Am. Rep. 90; Dexter v. Spear, 4 Mason, 115; Mason v. Mason, 4 N. H. 110; Wilson v. Noonan, 35 Wis. 321; Bodwell v. Osgood, 3 Pick. 379; Harwood v. Keech, 4 Hun, 389; Daly v. Byrne, 1 Abb. N. C. 150; Fox v. Broderich, 14 Irish L. (N. S.) 453; Gilmer v. Eubank, 13 Ill. 271; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. Rep. 226; Bronson v. Bruce, 59 Mich. 467, 26 N. W. Rep. 671, 60 Am. Rep. 307; Pratt v. Pioneer Press Co., 32 Minn. 217, 18 N. W. Rep. 836, 20 id. 87; Neeb v. Hope, 111 Pa. 145, 2 Atl. Rep. 568; Barr v. Moore, 87 Pa. 385, 30 Am. Rep. 367; Smedley v. Soule, 125 Mich. 192, 84 N. W. Rep. 63; Hintz v. Graupner, 138 Ill. 158, 27 N. E. Rep. 935; Taylor v. Ellington, 46 La. Ann. 371, 15 So. Rep. 499; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. Rep. 752; Upton v. Hume, 24 Ore. 420, 431, 33 Pac. Rep. 810, 21 L. R. A. 493, 41 Am. St. 863.

[3] Welch v. Ware, 32 Mich. 84; Detroit Daily Post v. McArthur, 16 Mich. 447; Fry v. Bennett, 28 N. Y. 324; McDonald v. Woodruff, 2 Dill.

The true rule seems to be that when the words are actionable in themselves and are not uttered upon a lawful occasion and with justifiable motives, the law will infer malice so as to enable the plaintiff to recover damages although none be proved. But of this technical or legal malice, as it may be termed, there may be various degrees as indicated by the manner in and the circumstances under which the slanderous charges are made. And other circumstances may exist which show not merely technical malice, but actual hatred and revengeful feelings, the malignant design of the slanderer to do the utmost possible injury. For acts done or words uttered under such different circumstances, and with such variant motives and purposes on the part of the slanderer, the same measure of damages cannot be properly awarded.[1]

§ 1209. Same subject. Actions for such wrongs are designed not only to furnish some indemnity, so far as money can do it, for the injury inflicted, but to vindicate the [652] character of the person unjustly assailed and to protect against a repetition of the outrage. It is right that juries should make a discrimination in the damages they award according to the circumstances, position, conduct, motives and purposes of the slanderer as disclosed in the proofs; and they may rightfully award more severe damages for the wilful, designed, malicious and mischievous repetition of a story known to be false and repeated with a design to injure than for the idle and garrulous repetition of a tale supposed, or even believed without examination, to be true. If the defendant has indicated his intention to injure by his direct declarations, by repetitions of the slander or other acts having a tendency to show malice in its common acceptation of personal ill-will, that may be shown in evidence.[2] And so may the fact that the defendant knew

244; Sawyer v. Hopkins, 22 Me. 268; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Townshend on Sland. & L., § 392; Ransom v. McCurley, 140 Ill. 626, 636, 31 N. E. Rep. 119; Craven v. Walker, 101 Ga. 845, 29 S. E. Rep. 152; Bailey v. Bailey, 94 Iowa, 598, 63 N. W. Rep. 341; Alcorn v. Powell, 22 Ky. L. Rep. 1353, 60 S. W. Rep. 520; Conant v. Leslie, 85 Me. 257, 27 Atl. Rep. 147; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. Rep. 752; Enos v. Enos, 135 N. Y. 609, 32 N. E. Rep. 123; Wright v. Gregory, 9 App. Div. 85, 41 N. Y. Supp. 139; Barker v. Prizer, 150 Ind. 4, 48 N. E. Rep. 4; Halley v. Gregg, 74 Iowa, 563, 38 N. W. Rep. 416; Botsford v. Chase, 108 Mich. 432, 66 N. W. Rep 325.

[1] Symonds v. Carter, 32 N. H. 467.

[2] Jones v. Greeley, 25 Fla. 629, 642, 6 So. Rep. 448; Cruikshank v. Gor-

the charge to be false when he uttered it, for the necessary inference from such proof must be hatred and malignity.[1] To show that the defendant knew of the falsity of a charge of theft from the person, published by him, it was allowed to be proved by the plaintiff that, after the stated time of the theft, the defendant continued upon friendly terms with him.[2] So where the defendant made the defamatory charge professedly on information stated by him to be derived from certain named persons who were witnesses of the crime charged, evidence by such persons that they had given no such information was received to show actual malice.[3] Preferring a bill of indictment against the plaintiff, which is ignored by the grand jury, may be shown to prove malice.[4]

The refusal of the editor of a newspaper to publish a retraction of a libel published in his paper does not tend to prove his *animus* to have been malicious,[5] but such refusal is admissible for the purpose of enhancing damages,[6] and so is the refusal to retract a verbal slander.[7] In an action for slander in [653] charging an infant with larceny, evidence of a previous quarrel between defendant and plaintiff's father and next friend is inadmissible to prove malice in the defendant towards the plaintiff.[8] The plaintiff may give in evidence any expressions of the defendant, oral or written, which indicate spite or ill-will, for the purpose of showing the temper and disposition

don, 118 N. Y. 178, 23 N. E. Rep. 457; Symonds v. Carter, 32 N. H. 467; Westerfield v. Scripps, 119 Cal. 607, 51 Pac. Rep. 958; Hearne v. De Young, 119 Cal. 670, 52 Pac. Rep. 150; Alliance Review Pub. Co. v. Valentine, 9 Ohio Ct. Ct. 387; Upton v. Hume, 24 Ore. 420, 33 Pac. Rep. 810, 21 L. R. A. 493, 41 Am. St. 863.

[1] Plummer v. Johnsen, 70 Wis. 131, 35 N. W. Rep. 334; Stow v. Converse, 3 Conn. 325, 8 Am. Dec. 189; Harwood v. Keech, 4 Hun, 389; Bullock v. Cloyes, 4 Vt. 304; Sexton v. Brock, 15 Ark. 345; Farley v. Ranck, 3 W. & S. 554; Fountain v. Boodle, 3 Q. B. 5. But see Hartranft v. Hesser, 34 Pa. 117.

[2] Burton v. March, 6 Jones, 409.

[3] Harwood v. Keech, 4 Hun, 389.

[4] Tolleson v. Posey, 32 Ga. 372; Hintz v. Graupner, 138 Ill. 158, 27 N. E. Rep. 935; Harbison v. Shook, 41 Ill. 141.

[5] Bradley v. Cramer, 66 Wis. 297, 28 N. W. Rep. 372.

[6] Edsall v. Brooks, 2 Robert. 414; Pratt v. Pioneer Press Co., 35 Minn. 251, 28 N. W. Rep. 708; Barnes v. Campbell, 60 N. H. 27; Malloy v. Bennett, 15 Fed. Rep. 371; Long v. Tribune Printing Co., 107 Mich. 207, 65 N. W. Rep. 108.

[7] Klewin v. Bauman, 53 Wis. 244, 10 N. W. Rep. 398.

[8] York v. Pease, 2 Gray, 282.

with which he made the publication complained of.[1] The style and character of the language are also circumstances which may be left, with others, to the consideration of the jury on the question whether the words were spoken maliciously, and especially when the question is if they were maliciously uttered under color of privilege.[2] The manner in which the publication is made may offer in itself strong evidence of malice.[3] The unnecessary transmission of libelous matter by telegraph or by post-card, when it might be sent by letter, is evidence of malice.[4] Where the defamatory matter is published upon a lawful occasion, that is, upon an occasion which furnishes, *prima facie*, a legal excuse for it, as where it is done in the discharge of some public or private legal or moral duty, or in the conduct of the defendant's own affairs, in matters where his interest is concerned,[5] it is said to be conditionally a privileged communication or publication. The legal excuse for the publication rebuts the presumption of malice from the falsity of the communication; and where such matter is the subject of an action the plaintiff must show malice to maintain it.[6] Testimony honestly given in a judicial proceeding of the circumstances connected with the utterance of the slanderous words on which the suit is based and tending to a mitigation of the damages is not to be considered as a malicious repetition of the slander.[7]

§ 1210. Same subject; wealth and rank of the parties. The plaintiff may prove in aggravation of damages his rank

[1] Folkard's Stark. on Slander & L. 452; Wright v. Woodgate, 2 Cr., M. & R. 573; Wright v. Gregory, 9 App. Div. 85, 41 N. Y. Supp. 139; Smith v. Times Co., 4 Pa. Dist. Rep. 399.

If the defendant's case is conducted with spite and malice, the counsel cannot shelter his client by assuming responsibility therefor. The defendant must answer for the course taken by his counsel. Lamb v. West, 15 N. S. W. L. R. 120, 127.

[2] Toogood v. Spyring, 1 Cr., M. & R. 181; Fryer v. Kennersley, 15 C. B. (N. S.) 422; Cooke v. Wildes, 5 El. & B. 328; Jones v. Greeley, 25 Fla. 629, 642, 6 So. Rep. 448.

[3] Halley v. Gregg, 82 Iowa, 622, 48 N. W. Rep. 974.

[4] Williamson v. Freen, L. R. 9 C. P. 393. The jury may consider what the defendant's conduct has been before action, after action, and in court during the trial. Praed v. Graham, 24 Q. B. Div. 53.

[5] Toogood v. Spyring, 1 Cr., M. & R. 181.

[6] Cockayne v. Hodgkisson, 5 C. & P. 543; Servatius v. Pichel, 34 Wis. 292; Townshend on Slander & L., pp. 248, 249. See Howard v. Keech, 4 Hun, 389.

[7] Thompson v. McCready, 194 Pa. 32, 45 Atl. Rep. 78.

and condition in society.[1] Thus, where the charge was that a criminal offense had been committed, it was held that, inasmuch as mental suffering is an element of damages and the extent of such suffering may be heightened and the damages consequently increased by the disgrace that the plaintiff's family will suffer, it was proper to show that he had a wife and child.[2] There is a conflict of authority on the question,

[1] Klumph v. Dunn, 66 Pa. 141, 5 Am. Rep. 355; Smith v. Lovelace, 1 Duv. 215; Bodwell v. Swan, 3 Pick. 376; Howe v. Perry, 15 id. 506; Justice v. Kirlin, 17 Ind. 588; Hosley v. Brooks, 20 Ill. 115, 71 Am. Dec. 252; Peltier v. Mict, 50 Ill. 511; Tillotson v. Cheetham, 3 Johns. 56, 3 Am. Dec. 459; Larned v. Buffinton, 3 Mass. 546, 3 Am. Dec. 185; Clements v. Maloney, 55 Mo. 352; Harman v. Cundiff, 82 Va. 239; Palmer v. Haskins, 28 Barb. 90; Turner v. Hearst, 115 Cal. 394, 47 Pac. Rep. 129; Alliance Review Pub. Co. v. Valentine, 9 Ohio Ct. Ct. 387; Smith v. Times Co., 4 Pa. Dist. Rep. 399, 402; Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. Rep. 403. See Prescott v. Tousey, 50 N. Y. Super. Ct. 12; Perrine v. Winter, 73 Iowa, 645, 35 N. W. Rep. 679.

In a recent Irish case it is said; "The character, reputation and position of a plaintiff seeking to recover damages for a libel published against him must naturally constitute a material element for the consideration of a jury in estimating damages in such cases. Accordingly the object of the defendant in the present case has been to vilify the character and reputation of the plaintiff. Now, the plaintiff is a gentleman who for several years acted as a crown solicitor for the government. During that period he has conducted very important criminal cases with great ability, intelligence and integrity, and he was until lately believed, and I believe truly, to occupy a highly respectable position as a landed proprietor in Ireland. But on the other hand, the plaintiff, having tendered himself as witness in this case, has been obliged to admit certain matters made use of for the purpose of damaging his character and reducing the amount of damages. It appears, therefore, that the plaintiff some years ago married as a second wife a lady possessed of a considerable fortune, not of tender years, but rather the reverse, inasmuch as she had attained the mature age of seventy, and being a widow of some years' standing. And it was elicited from the plaintiff that some twelve years ago he had an immoral connexion with a maid servant of his wife. This connexion lasted for about one week and was not afterwards renewed. The plaintiff was then about fifty years of age; he had a wife living and also daughters by his former wife. It must be admitted that this conduct of the plaintiff was highly to be reprobated, but considering the time that has since elapsed and all the circumstances it does not occur to me that any juryman possessing any knowledge of the world, and the unhappy events which so often occur in it, would think it proper to make any very large reduction from any damages which he might otherwise think ought to be awarded owing to this unhappy occurrence." Bolton v. O'Brien, 16 L. R. Ire. 97, 110.

[2] Barnes v. Campbell, 60 N. H. 27; Cahill v. Murphy, 94 Cal. 29, 30 Pac. Rep. 195, 28 Am. St. 88.

but it is believed that the better opinion is that the [654] rank, condition and wealth of the defendant may be shown for the same purpose, that is, to affect as well compensatory as punitive damages.[1] The injury will be proportioned to the rank and influence of the defendant in the community where he publishes the defamatory matter. A knowledge of his

A married woman who has been charged with unchastity may show that she had a family of young children. Enos v. Enos, 135 N. Y. 609, 32 N. E. Rep. 123; Enquirer Co. v. Johnston, 72 Fed. Rep. 443, 18 C. C. A. 628.

[1] §§ 404, 405; Johnson v. Smith, 64 Me. 553; Humphreis v. Parker, 52 id. 507, 508; Stanwood v. Whitmore, 63 Me. 209; Barber v. Barber, 33 Conn. 335; Brown v. Barnes, 39 Mich. 211; Buckley v. Knapp, 48 Mo. 152; Bodwell v. Osgood, 3 Pick. 379; Karney v. Paisley, 13 Iowa, 89 (but it is said in Perrine v. Winter, 73 id. 645, 647, 35 N. W. Rep. 679, that "there are grave doubts whether this reasoning is correct, because it is not universally true that a man possessed of wealth has the confidence and respect of the community in which he lives"); Lewis v. Chapman, 19 Barb. 252; Kniffen v. McConnell, 30 N. Y. 289; Bennett v. Hyde, 6 Conn. 24; Case v. Marks, 20 Conn. 248; McAlmont v. McClelland, 14 S. & R. 359; Adcock v. Marsh, 8 Ired. 360; Wilms v. White, 26 Md. 380, 90 Am. Dec. 113; Kunkel v. Markell, 26 Md. 390; 2 Greenlf. Ev. 299; Jones v. Greeley, 25 Fla. 629, 641, 6 So. Rep. 448; Binford v. Young, 115 Ind. 174, 16 N. E. Rep. 142; Rea v. Harrington, 58 Vt. 181, 2 Atl. Rep. 475, 56 Am. Rep. 561; Nailor v. Ponder, 1 Marvel, 408, 41 Atl. Rep. 88 (but not his wealth); Hintz v. Graupner, 138 Ill. 158, 27 N. E. Rep. 935; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. Rep. 628; Botsford v. Chase, 108 Mich. 432, 66 N. W. Rep. 325; Loranger v. Loranger, 115 Mich. 681, 74 N. W. Rep. 228; Taylor v. Pullen, 152 Mo. 434, 53 S. W. Rep. 1086; Steen v. Friend, 20 Ohio Ct. Ct. 459; Arnold v. Sayings Co., 76 Mo. App. 159. But see Storey v. Early, 86 Ill. 461; Myers v. Malcolm, 6 Hill, 292; Palmer v. Haskins, 28 Barb. 90; Morris v. Barker, 4 Harr. 520; Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Dain v. Wycoff, 7 N. Y. 191; Austin v. Bacon, 49 Hun, 386, 3 N. Y. Supp. 587; Enos v. Enos, 58 Hun, 45, 11 N. Y. Supp. 415.

The wealth of the defendant is immaterial except so far as it affects vindictive damages. Bradley v. Cramer, 66 Wis. 297, 28 N. W. Rep. 372; Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. Rep. 403; Burckhalter v. Coward, 16 S. C. 435 (*semble*); Perrine v. Winter, 73 Iowa, 645, 35 N. W. Rep. 679. In Nebraska punitive damages are not recognized, and the wealth of the defendant is not a proper subject of proof to affect compensatory damages. Rosewater v. Hoffman, 24 Neb. 222, 38 N. W. Rep. 857. In Virginia the defendant's wealth is to be considered only in so far as it tends to show his rank and influence, not as affecting his ability to pay exemplary damages. Harman v. Cundiff, 82 Va. 239. This is the rule in North Carolina. Reeves v. Winn, 92 N. C. 246, 1 S. E. Rep. 448, 2 Am. St. 287. In Virginia if only compensatory damages are recoverable the standing of the defendant is immaterial. Sun L. Assur. Co. v. Bailey, — Va. —, 44 S. E. Rep. 692.

standing there is important to enable the jury to appreciate the injury resulting from his slanderous declarations; to enable them to determine what the injured party ought to receive for compensation and, in their discretion, what the defendant, for example and punishment, should pay.[1] As is shown by the notes there is not entire accord as to the purpose for which evidence of the reputed wealth of the defendant may be received: generally it is admissible to affect both compensatory and punitive damages; but in some states it is admissible only as to the former, and in others as to the latter. The general rule, as stated, has been applied in Michigan, though with some reservation as to its soundness. It is recognized that it is the duty of the trial court to instruct the jury that evidence of wealth can be considered only in its bearing upon the actual damages which the plaintiff has sustained, and that the wealth of the defendant is, of itself, no element of damage.[2] It has also been ruled there that evidence of the wealth of a corporation defendant in a libel suit is not admissible for any purpose. A corporation has no social rank or social influence to be augmented by its wealth or diminished by its poverty. It is not a member of society. Its libelous utterances will sting and injure according to the extent of its circulation, the character of the paper published, as it is known by its publications, and the character of the party assailed. A newspaper published by a corporation which is reputed to pay no dividends may have as extensive a circulation as one published by a corporation which is reputed to pay large dividends.[3]

The right of the plaintiff to prove his rank and condition in society includes that of showing his good character at and before the time of the publication of the defamatory matter. But it is held in some jurisdictions that the law presumes good character; that the general issue admits the falsity of the imputation, and that until the defendant has attacked it the plaintiff is not entitled to introduce any evidence on that subject. Thus in a Pennsylvania case Strong, J., said: "Evidence of his reputation is important only as affecting the

[1] Cases cited in first paragraph of preceding note.

[2] Brown v. Barnes, 39 Mich. 214; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. Rep. 628.

[3] Randall v. Evening News Ass'n, 97 Mich. 136, 56 N. W. Rep. 361, per Grant, J.

measure of the compensation to which he is entitled. The injury is less when his character is bad. In a certain sense, therefore, the character (reputation) of the plaintiff in every such action may be said to be put in issue. The plaintiff offers it to the attack of the defendant. The law presumes that it is good, but the defendant may traverse this presumption. Such a traverse is presented when the defendant offers evidence to show that it is bad. But until then a plaintiff is not at liberty to adduce evidence that his character is good; for, until it is attacked, the law presumes, and the defendant admits, [**655**] such to be the fact. Until then the defendant has refused to accept the issue tendered. This is an almost universal rule, not only in this state, but in England and in our sister states. Nor does the proof which, under the general issue, may be given of circumstances that may have awakened in the mind of the defendant a suspicion of the plaintiff's guilt, open the door for testimony in support of his character. Evidence of such circumstances is received in mitigation of damages, not because it shows that injury inflicted upon the plaintiff's reputation is any the less, but because it tends to disprove the existence of malice in the defendant. It is, of course, no answer to this to prove that the plaintiff was of good repute. His reputation may have been untarnished, and the circumstances under which the actionable words were spoken may have been such as to indicate that there was very little malice in the defendant. It is, therefore, only where evidence has been given directly attacking the character of the plaintiff that he is at liberty to introduce proof of his good reputation."[1]

The plea of not guilty puts in issue the general reputation of the plaintiff. The amount of his recovery will be affected by any evidence which supports or disparages that reputation. It is presumptively good when the trial begins, and until the presumption is overturned by proof. It is trite to say that

[1] Chubb v. Gsell, 34 Pa. 115. Compare Klumph v. Dunn, 66 Pa. 147, in which Judge Sharswood said: "The position in life, and the family of the plaintiff, are always important circumstances bearing upon the question of damages, and have always been held admissible for that purpose." McAlmont v. McClelland, 14 S. & R. 359, is more strongly in favor of this rule.

what the law presumes, and so long as the presumption continues, need not be proved; but where proof may add to what the law presumes or make specific what the law presumes only in a general way, and such addition or particularity may legitimately increase damages, it is admissible in the first instance; as is the case on the element of malice. As the reputation of the plaintiff is in issue by the very nature of the proceeding, if the jury can estimate the damages with a more intelligent appreciation of the injury after they have heard affirmative evidence of the plaintiff's reputation than if the case is submitted to them on the mere supposition which the law raises that it is good, it is reasonable and proper such evidence be [656] received. In Burton v. March[1] it was held not error to receive it. Other cases recognize the propriety of the plaintiff showing affirmatively as part of his case his good reputation,[2] though there is not entire agreement on the subject.[3]

§ **1211. Same subject.** In cases of defamation character is the object of attack, and in actions for that wrong the injury thereto is the *gravamen* complained of, and its vindication the object of the action.[4] It is said in a case in Connecticut[5] that the plaintiff's character is not made the subject of inquiry at the defendant's option, and shut out of view or investigation as shall best subserve the defendant's pleasure and interest. To a rule so inequitable, for the want of mutuality, the courts of that state have never acceded; but they have recognized and acted on the principle that the final object of the plaintiff's suit is the vindication of his character; and that his reputation, of consequence, is put in issue by the nature of the proceeding itself; he may introduce evidence of his reputation, not only to sustain it from attack, but to prove its excellence. In a case in Wisconsin[6] the court say: "In actions of slander it is well settled that the plaintiff's general character is in-

[1] 6 Jones, 409.

[2] Bennett v. Hyde, 6 Conn. 24; § 1211; Press Pub. Co. v. McDonald, 63 Fed. Rep. 238, 11 C. C. A. 155, 26 L. R. A. 531; Peltier v. Mict, 50 Ill. 511; Adams v. Lawson, 17 Gratt. 250, 94 Am. Dec. 455; Romayne v. Duane, 3 Wash. C. C. 246, Fed. Cas. No. 12,028.

[3] Gandy v. Humphries, 35 Ala. 617; Wright v. Schraeder, 2 Curt. 548, Fed. Cas. No. 18,191; Prescott v. Tousey, 50 N. Y. Super. Ct. 12; Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 574, 41 S. W. Rep. 381.

[4] Bennett v. Hyde, 6 Conn. 24.

[5] Stow v. Converse, 4 Conn. 42.

[6] Campbell v. Campbell, 54 Wis. 97, 11 N. W. Rep. 456.

volved in the issue; and the evidence showing what it is, and consequently its true value, may be offered on either side to affect the amount of damages.[1] The rule thus stated has frequently received the sanction of this court."[2] But all cases recognize the right of the plaintiff to answer the defendant's evidence against his general reputation by proof to support it.[3] It was said that if the plaintiff has a well-established character so that there is less likelihood of the slander hurting him than there would be if he was a new man starting in the effort to build up a reputation, that fact may be proved and considered.[4] If this be the rule, taken in connection with the principle which allows damages to be mitigated if the plaintiff's character is bad, it leaves the recovery of substantial damages for slander to that class of people whose characters are neither good nor bad. There is, however, nothing in the doctrine of the case stated which is inconsistent with the fundamental principle of the law of damages—compensation for the injury suffered.

§ 1212. Evidence of reputation. The evidence in regard to the plaintiff's reputation must be directed to his general reputation, or to his general reputation in regard to the trait [657] involved in the imputation;[5] particular acts to affect it cannot

[1] Citing 2 Greenl. Ev., § 275; Earl of Leicester v. Walter, 2 Camp. 251; Larned v. Buffinton, 3 Mass. 456, 3 Am. Dec. 185; Stone v. Varney, 7 Met. 86, 39 Am. Dec. 762; Burnett v. Simpkins, 24 Ill. 264.

[2] Maxwell v. Kennedy, 50 Wis. 645, 7 N. W. Rep. 657; Wilson v. Noonan, 27 Wis. 590; B——— v. I———, 22 id. 272; Haskins v. Lumsden, 10 id. 359. The court add: "Whether plaintiff in the first instance, and before his character had been assailed, can give evidence of his own good character, it is not necessary here to decide."

[3] Harding v. Brooks, 5 Pick. 244; Byrket v. Monohon, 7 Blackf. 83, 41 Am. Dec. 212; Smith v. Lovelace, 1 Duv. 215; Waters v. Jones, 3 Port. 442, 29 Am. Dec. 261; Seymour v. Merrills, 1 Root, 459; Sheahan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Moyer v. Moyer, 49 Pa. 210; Cox v. Strickland, 101 Ga. 482, 28 S. E. Rep. 655.

[4] Broughton v. McGrew, 39 Fed. Rep. 672, 679, per Woods, J.

[5] Lambert v. Pharis, 3 Head, 622; Maynard v. Beardsley, 7 Wend. 560, 22 Am. Dec. 595; B——— v. I———, 22 Wis. 372; Birchfield v. Russell, 3 Cold. 228; McAlexander v. Harris, 6 Munf. 465; Steinman v. McWilliams, 6 Pa. 170; Brunson v. Lynde, 1 Root, 354; Sheahan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Burton v. March, 6 Jones, 409; Moyer v. Moyer, 49 Pa. 210; Powers v. Presgroves, 38 Miss. 227; Bennett v. Matthews, 64 Barb. 410; Leonard v. Allen, 11 Cush. 241; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Wright v. Schroeder, 2 Curtis, 548; Fountain v. West, 28

be proved.[1] Where his reputation is consequentially attacked by proving the truth of the imputation he is not entitled to answer it by proving his good reputation; in other words, he is not entitled to prove his good reputation to countervail the evidence of the specific act or acts shown to establish the plea of justification. In criminal cases defendants are permitted to give evidence of general character to repel the charge upon the ground that a presumption of innocence arises from former conduct in society as evidenced by such character, since it is not probable that a person of known probity or humanity would commit a dishonest or outrageous act in the particular instance.[2] But this species of evidence is not available in civil actions for torts generally, nor to rebut evidence that alleged slanderous words were true.[3]

§ **1213. Injuries to business.** Language may be actionable *per se* though it does not impute any crime. It is so if by it one is charged with having either of certain diseases.[4] So if one is disparaged in his office, profession, trade or business in such manner as that by natural and proximate consequence he will be prevented from deriving therefrom that pecuniary reward which probably he might otherwise have obtained.[5]

Iowa, 9, 92 Am. Dec. 405; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468; Warner v. Lockerby, 31 Minn. 421, 18 N. W. Rep. 145, 821; Lowe v. Herald Co., 6 Utah, 175 (holding that in an action for charging rape the defendant's reputation as a business man may be proved, as well as his reputation for chastity and virtue); Drown v. Allen, 91 Pa. 393; Duval v. Davy, 32 Ohio St. 604; Sanford v. Rowley, 93 Mich. 119, 52 N. W. Rep. 1119; Post Pub. Co. v. Hallam, 59 Fed. Rep. 530, 8 C. C. A. 201.

"When a man is charged with selling his influence in a political convention the trait of his character which is attacked is his integrity — his general integrity." Post Pub. Co. v. Hallam, *supra*.

[1] Andrews v. Vanduser, 11 Johns. 38; Swift v. Dickerman, 31 Conn. 285; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468; Burke v. Miller, 6 Blackf. 155; Parkhurst v. Ketchum, 6 Allen, 406, 83 Am. Dec. 639; Hallowell v. Guntle, 82 Ind. 554; Indianapolis Journal Newspaper Co. v. Pugh, 6 Ind. App. 510, 516, 33 N. E. Rep. 991.

[2] 2 Stark. Ev. 365.

[3] Matthews v. Huntley, 9 N. H. 146; Severance v. Hilton, 24 id. 147; Shipman v. Burrows, 1 Hall, 399; Wright v. Schroeder, 2 Curt. 548; Stow v. Converse, 3 Conn. 325, 8 Am. Dec. 189; Bamfield v. Massey, 1 Camp. 460; Haun v. Wilson, 28 Ind. 296; Miles v. Van Horn, 17 id. 245; Rhodes v. Ijames, 7 Ala. 574, 42 Am. Dec. 604; Holley v. Burgess, 9 Ala. 728.

[4] Townshend on Slander & L., § 175.

[5] Foulger v. Newcomb, L. R. 2 Ex. 327; Babonneau v. Farrell, 15 C. B. 360; Pratt v. Pioneer Press Co., 35 Minn. 251, 28 N. W. Rep. 708; Mis-

The special character in respect of which such imputa- [658] tions will be actionable may be any lawful employment in which a livelihood may be gained or from which emoluments are derived. The language must be such as, if true, would disqualify or render him less fit to fulfill the duties of the special character he has assumed.[1] To charge a partnership with insolvency;[2] the chief engineer of a city fire department with being drunk at a fire;[3] saying a school mistress is a dirty slut,[4] insane,[5] or wanting in chastity;[6] that a blacksmith keeps false books;[7] that a shop-keeper had nothing but rotten goods in his shop,[8] — is to utter actionable words. It is not enough that the language tends to injure the person in his office, profession or trade; it must be published of him in his official or business character.[9] Where, however, one is in business words spoken of him in his private character may be actionable on account of their necessary effect to injure him in his business; as any words affecting the credit of a man who is a merchant, or who pursues any business in which pecuniary credit is important.[10] The same rule governs

souri Pacific R. Co. v. Richmond, 73 Tex. 568, 11 S. W. Rep. 555, 15 Am. St. 794, 4 L. R. A. 280; Daisley v. Douglass, 119 Fed. Rep. 485; Hollenbeck v. Ristine, 114 Iowa, 358, 86 N. W. Rep. 377; De Pew v. Robinson, 95 Ind. 109; Henkel v. Schaub, 94 Mich. 542, 54 N. W. Rep. 293; Smedley v. Soule, 125 Mich. 192, 84 N. W. Rep. 63; Botsford v. Chase, 108 Mich. 432, 66 N. W. Rep. 325; Kahn v. Cincinnati Times-Star, 10 Ohio Dec. 599; Robinson v. Eau Claire Book & S. Co., 110 Wis. 369, 85 N. W. Rep. 983; Oliver v. Perkins, 92 Mich. 304, 52 N. W. Rep. 609; Parker v. Republican Co., 181 Mass. 392, 63 N. E. Rep. 931.

The plaintiff may testify as to the several employments he was engaged in at the time the slander was uttered. Halley v. Gregg, 82 Iowa, 622, 48 N. W. Rep. 974.

[1] Townshend on Slander & L., § 190.

[2] Titus v. Follett, 2 Hill, 318.

[3] Gottbehuet v. Hubachek, 36 Wis. 515.

[4] Wilson v. Runyon, Wright, 651.

[5] Morgan v. Lingen, 8 L. T. Rep. (N. S.) 800.

[6] Bodwell v. Osgood, 3 Pick. 379.

[7] Burtch v. Nickerson, 17 Johns. 217, 8 Am. Dec. 390.

[8] Burnett v. Wells, 12 Mod. 420. For other illustrations see Townshend on Slander & L., ch. 8.

[9] Van Tassel v. Capron, 1 Denio, 250, 43 Am. Dec. 667; Worten v. Searing, 1 Vict. L. R. 122; Redway v. Gray, 31 Vt. 292: Buck v. Hersey, 31 Me. 558; Doyley v. Roberts, 3 Bing. N. C. 835; Brayton v. Cleveland Special Police, 63 Ohio St. 83, 57 N. E. Rep. 1085; McCallum v. Lambie, 145 Mass. 234, 13 N. E. Rep. 899; Smedley v. Soule, 125 Mich. 192, 84 N. W. Rep. 63; Newell on Defamation, etc., p. 181. See Potter v. New York Evening Journal Ass'n, 68 App. Div. 95, 74 N. Y. Supp. 317.

[10] Jones v. Littler, 7 M. & W. 423; Fowler v. Bowen, 30 N. Y. 23; Lewis v. Hawley, 2 Day, 495, 2 Am. Dec.

as to a corporation engaged in manufacturing, trading, banking or other occupation in which credit may be material to its success.[1] When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability; when, from the nature of the business, great confidence must necessarily be reposed they are actionable, though not applied by the speaker to the profession or occupation of the plaintiff; but when they convey an imputation upon his character equally injurious to every one of whom they might be spoken they are not actionable, unless such application be made.[2] In an action for libel the fact that the words used had reference to the profession or business of [659] the plaintiff is not the substantive ground of the action; their actionable quality does not in any case depend upon that consideration. And the plaintiff in such a case is entitled to recover for damages to him in his profession by reason of the libel without specific proof in regard to them.[3] In this respect, as has been before remarked, there is a distinction between libel and verbal slander.

Under an allegation of loss of business a general loss or decline of patronage may be shown without naming particular customers or proving that they have ceased to do business with the plaintiff;[4] but if the loss sued for grew out of the failure of the customers of the plaintiff to enter into certain business engagements with him the names of the persons who were so induced by the libel must be given.[5] If the cause of action is the general injury to the plaintiff's reputation as a dealer and contractor the jury may consider that a merchant in poor credit is ordinarily compelled to pay more for goods

121; Starr v. Gardner, 6 Up. Can. Q. B. (O. S.) 512; Hogg v. Dorrah, 2 Port. 22; Davis v. Ruff, 1 Cheves, 17, 34 Am. Dec. 584; Western U. Tel. Co. v. Pritchett, 108 Ga. 411, 34 S. E. Rep. 216; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. Rep. 358, 724, 38 Am. St. 592, 20 L. R. A. 138; Masters v. Lee, 39 Neb. 574, 58 N. W. Rep. 222; Bee Pub. Co. v. World Pub. Co., 59 Neb. 713, 82 N. W. Rep. 28; Dun v. Weintraub, 111 Ga. 146, 36 S. E. Rep. 808, 50 L. R. A. 670.

[1] Arrow Steamship Co. v. Bennett, 73 Hun, 81, 25 N. Y. Supp. 1029.

[2] Sanderson v. Caldwell, 45 N. Y. 405, 6 Am. Rep. 105. See Ivey v. Pioneer Savings & Loan Co., 113 Ala. 349, 359, 21 So. Rep. 531.

[3] Id.

[4] Bee Pub. Co. v. World Pub. Co., 59 Neb. 713, 82 N. W. Rep. 28.

[5] Brinkmann v. Taylor, 103 Fed. Rep. 773.

than one in good credit, and that parties who have contracts to give are reluctant to give them to persons of doubtful financial reputation.[1] A charge of drunkenness against one who is a minister,[2] or a master mariner in command of a vessel,[3] or a female[4] is actionable. Similar in nature to slander of one respecting his calling or vocation is the refusal to give an employee a clearance card, the effect thereof amounting to a representation that the person to whom it is refused belongs to a class not to be employed, he in fact not belonging thereto. Where there is a mutual agreement among employers not to employ men who have been discharged from or may quit their service unless such a card is presented, one entitled to such a card may recover damages for the refusal to furnish it if such refusal prevents him from obtaining employment.[5]

§ **1214. Mental suffering.** For such actionable words spoken or libelous matter published the damages are left to the discretion of the jury upon the particular facts. Compensatory damages may properly include recompense for the loss of patronage,[6] including that which may in the future arise from the publication of the libel;[7] and where the imputation is actionable because of its necessary operation to cause such injury and is of a want of personal fitness, or of any necessary moral trait, or is an imputation of gross dereliction in professional practice, injury to the feelings, mental anxiety and suffering must[8] or may be taken into consideration.[9] In a Connecticut

[1] Daisley v. Dun, 107 Fed. Rep. 218.

[2] McMillen v. Birch, 1 Bin. 178, 2 Am. Dec. 426; Chaddock v. Briggs, 13 Mass. 248. But see Tighe v. Wicks, 33 Up. Can. Q. B. 479.

[3] Irwin v. Brandwood, 2 H. & C. 960; Norfolk & W. Steamboat Co. v. Davis, 12 D. C. App. Cas. 306.

[4] Brown v. Nickerson, 5 Gray, 1.

[5] New York, etc. R. Co. v. Schaffer, 17 Ohio Ct. Ct. 77; Mattison v. Lake Shore, etc. R. Co., 2 Ohio Nisi Prius, 276.

[6] Weiss v. Whittemore, 28 Mich. 353; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. Rep. 266; Bergmann v. Jones, 94 N. Y. 51. See Oliver v. Perkins, 92 Mich. 304, 52 N. W. Rep. 609, for facts which justified the recovery of the profits of a business which was broken up by a series of wrongs, including libel.

[7] Ingram v. Lawson, 6 Bing. N. C. 212; Tripp v. Thomas, 3 B. & C. 427; Norfolk & W. Steamboat Co. v. Davis, 12 D. C. App. Cas. 306.

[8] Nicholson v. Merritt, 23 Ky. L. Rep. 2281, 67 S. W. Rep. 5.

[9] Welker v. Butler, 15 Ill. App. 209; Stallings v. Whittaker, 55 Ark. 494, 18 S. W. Rep. 829; Norfolk & W. Steamboat Co. v. Davis, *supra*.

case[1] the defamatory words spoken of a practicing physician were such as to imply that he was so ignorant and unskilful that most of his patients lost their lives by following his prescriptions; and upon this point Sanford, J., said: "It is true that the words spoken relate only to the plaintiff's professional character and are aimed especially at his pecuniary interest dependent upon his professional calling and employment. But the natural, if not the necessary, effect of professional degradation and disgrace is personal anxiety and suffering on account of it. And that anxiety and suffering were proper subjects for compensation to the plaintiff and ought to be atoned for by the defendant. There is and there ought to be no other rule upon the subject than that a tort-feasor shall be held responsible in damages for the full amount of all the immediate injury caused by his [660] wrongful acts. This rule was adopted by the superior court and sanctioned by this court in the recent case of Lawrence v. Housatonic R. R. Co.,[2] in that of Seger v. Barkhamsted[3] and in many other cases. It is difficult to conceive how a member of either of the learned professions can be injured in his professional character without being at the same time subjected to anxiety and mental suffering,—suffering on account of professional dishonor, to be followed as it naturally and almost necessarily is and *always ought to be* by social degradation and disgrace, and the ultimate loss of professional employment with its honors and emoluments. Bodily pain comprises but a very small part of the suffering endured by rational beings, and the injuries which the calumniator inflicts act, often entirely and always immediately, upon the mental sensibilities of his victim. Mental suffering then constitutes an important element in the calculation of compensation to be made for such an injury." The mental suffering for which there may be a recovery is only such as the plaintiff naturally experiences as the direct, immediate and proximate effect of the libel; he cannot prove what third persons have said respecting the publication for the purpose of showing increased mental suffering.[4]

Independently of injuries to business interests, there is no

[1] Swift v. Dickerman, 31 Conn. 294.
[2] 29 Conn. 390.
[3] 22 Conn. 290.
[4] Turner v. Hearst, 115 Cal. 394, 47 Pac. Rep. 129. See Raines v. New York Press Co., 92 Hun, 515, 37 N. Y. Supp. 45.

dissent from the proposition that mental suffering is an element of damages in actions of this class. Where the words employed are actionable *per se* damages for such suffering are not special.[1] This rule is not affected by a statute which provides that in actions for slander only actual damages to property, business or feelings are recoverable.[2] Malice is not essential to the right to recover for mental distress.[3] Wounded feelings, enfeebled health and incapacity to perform labor, if these result from words slanderously spoken, are elements which require compensation.[4] But it is held in Vermont that loss of time, physical pain and expense do not constitute elements of damage, though they may be proved to show the

[1] Chesley v. Tompson, 137 Mass. 136; Nicholson v. Rogers, 129 Mo. 136, 31 S. W. Rep. 260; Childers v. San Jose Mercury Printing & Pub. Co., 105 Cal. 284, 38 Pac. Rep. 903, 45 Am. St. 40.

[2] Cribbs v. Yore, 119 Mich. 237, 77 N. W. Rep. 927.

[3] Malloy v. Bennett, 15 Fed. Rep. 371; Shattuc v. McArthur, 29 id. 136; Dufort v. Abadie, 23 La. Ann. 280; Lombard v. Lennox, 155 Mass. 70, 28 N. E. Rep. 1125, 31 Am. St. 528; Warner v. Press Pub. Co., 132 N. Y. 181, 30 N. E. Rep. 393; Cahill v. Murphy, 94 Cal. 29, 30 Pac. Rep. 195, 28 Am. St. 88; Lehrer v. Elmore, 100 Ky. 56, 37 S. W. Rep. 292; Long v. Tribune Printing Co., 107 Mich. 207, 65 N. W. Rep. 108; Baldwin v. Boulware, 79 Mo. App. 5; Brooks v. Harrison, 91 N. Y. 83, 92; Van Ingen v. Star Co., 1 App. Div. 429, 37 N. Y. Supp. 114, affirmed without opinion, 157 N. Y. 695; Belo v. Fuller, 84 Tex. 450, 19 S. W. Rep. 616, 31 Am. St. 75; Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 574, 41 S. W. Rep. 381; Fenstermaker v. Tribune Pub. Co., 13 Utah, 532, 45 Pac. Rep. 1097, 35 L. R. A. 611; Enquirer Co. v. Johnston, 72 Fed. Rep. 443, 18 C. C. A. 628; Washington Gas Light Co. v. Lansden, 9 D. C. App. Cas. 508; Derham v. Derham, 123 Mich. 451, 82 N. W. Rep. 218; Palmer v. New York News Pub. Co., 31 App. Div. 210, 215, 52 N. Y. Supp. 539; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. Rep. 1051.

Under a statute providing for the survival of causes of action for personal injuries not resulting in death, damages for mental suffering of the person libeled may, in an action for the libel by his representative, after the death of such person pending the action, be recovered. Houston Printing Co. v. Dement, 18 Tex. Civ. App. 30, 44 S. W. Rep. 558.

A statute making the publication of a libel concerning a deceased person, which tends to scandalize the surviving relatives of such person, punishable criminally, does not give the mother of an adult deceased person a right of action for shame, humiliation and mental anguish suffered by her on account of the libel. Bradt v. New Nonpareil Co., 108 Iowa, 449, 79 N. W. Rep. 122, 45 L. R. A. 681. Such an action will not lie regardless of such a statute. Sorenson v. Balaban, 4 N. Y. Ann. Cas. 7, 42 N. Y. Supp. 654; Wellman v. Sun Printing & Pub. Ass'n, 66 Hun, 331, 21 N. Y. Supp. 577.

[4] Zeliff v. Jennings, 61 Tex. 458.

severity of mental suffering.[1] The right to recover for mental suffering is not dependent upon the existence of other damage as the result of the slander or libel.[2]

§ 1215. Special damages. If the defamed party suffers a particular injury which the jury would not be entitled to consider as the necessary result of the actionable publication, but which is a natural and proximate consequence thereof, it may be made the subject of additional compensation. Consequential, as distinguished from direct and necessary, damages are generally special.[3] What are special damages distinctively is very clearly stated in a Maryland case,[4] in which the court held that whether the words in themselves are actionable or only become so because of some special damage no evidence of any particular loss or injury caused by the words spoken is admissible unless such loss or injury is particularly pleaded. In certain actions special damages for defamation are essential to be shown in order to their maintenance. This is the case in all actions where the language used was not actionable *per se*.[5] And the special damages which must be shown in such cases may be alleged and proved, besides the necessary or general damages in the class of cases which have been considered, and they cannot otherwise be recovered.[6] If alleged

[1] Rea v. Harrington, 58 Vt. 181, 2 Atl. Rep. 475, 56 Am. Rep. 561. *Contra*, as to expense, Shattuc v. McArthur, 29 Fed. Rep. 136.

[2] Hacker v. Heiney, 111 Wis. 313, 319, 87 N. W. Rep. 249.

[3] §§ 417–420.

[4] Dicken v. Shepherd, 22 Md. 399.

[5] If the words spoken are actionable *per se* and could have been understood by those who heard them in no other sense, averment and proof of special damages are unnecessary. Michael v. Matheis, 77 Mo. App. 556, 562; Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. Rep. 358. Louisville Courier-Journal Co. v. Pope, 15 Ky. L. Rep. 877 (Ky Super. Ct.), proceeds on the opposite theory so far as pleading is concerned.

[6] Dicken v. Shepherd, *supra;* Shipman v. Burrows, 1 Hall, 399; Harcourt v. Harrison, id. 474; Servatius v. Pichel, 34 Wis. 294; Rummell v. Otis, 60 Mo. 365; Price v. Whitely, 50 Mo. 439; McDuff v. Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. Rep. 671, 22 Am. St. 673; Dun v. Weintraub, 111 Ga. 416, 36 S. E. Rep. 808; Mudd v. Rogers, 102 Ky. 280, 43 S. W. Rep. 255; Hatt v. Evening News Ass'n, 94 Mich. 119, 54 N. W. Rep. 766, quoting the text; Roberts v. Breckon, 31 App. Div. 431, 52 N. Y. Supp. 638; O'Toole v. Post Printing & Pub. Co., 179 Pa. 271, 36 Atl. Rep. 288; Cranfill v. Hayden, 22 Tex. Civ. App. 656, 55 S. W. Rep. 805, citing the text; Rembt v. Roehr Pub. Co., 71 App. Div. 459, 75 N. Y. Supp. 861; Loftus v. Bennett, 68 App. Div. 128, 47 N. Y. Supp. 290; Gambrill v. Schooley, 95 Md. 260, 52 Atl. Rep. 500.

and not proved the action may still be maintained and [661] substantial damages recovered.[1] Special damages are not recoverable if the plaintiff is not entitled to recover a nominal sum as general damages.[2] In Iowa the desertion of a husband by his wife is not such a natural and proximate consequence of a slander which accuses him of larceny and adultery as to entitle him to special damages therefor. It might be otherwise if the charge was made for the purpose of accomplishing that result.[3] The contrary and better view is declared in Nebraska: The alienation of the affections of a husband or wife and the loss of home and support which are proved to result from the circulation of slanderous reports charging the injured party with adultery are the natural and probable consequences of such reports, and constitute elements of damage in favor of such party in an action against the slanderer.[4] If the plaintiff is restricted in his recovery to the special damages pleaded and proved he cannot recover general damages for the loss of his reputation.[5] One who is a member of a legislative body cannot recover for the expense incurred as the result of an investigation by the same of the libelous charge made against him unless it appears that the investigation was sought by the defendant; and so of the injury to the plaintiff's feelings as the result of the investigation.[6] If in consequence of false and unfounded statements concerning the business standing of the plaintiff his creditors, who were supplying him goods on credit, were induced to demand immediate payment of their claims upon which he would otherwise have been extended time, and, in consequence, he was compelled to pay a discount upon his notes in order to raise money with which to meet such indebtedness, the sums so paid as

If the plaintiff claims damages for loss of time, the fact that his employer made no deduction from his wages on that account does not relieve the defendant. Elmer v. Fessenden, 154 Mass. 427, 28 N. E. Rep. 298.

[1] Weiss v. Whittemore, 28 Mich. 353; Wier v. Allen, 51 N. H. 181; Smith v. Thomas, 2 Bing. N. C. 380.

[2] Kidd v. Ward, 91 Iowa, 371, 59 N. W. Rep. 279.

[3] Georgia v. Kepford, 45 Iowa, 48.

[4] Case v. Case, 45 Neb. 493, 63 N. W. Rep. 867, approving the opinion of Lord Campbell in Lynch v. Knight, 9 H. of L. 577.

[5] Albrecht v. Patterson, 12 Vict. L. R. 821.

[6] Raines v. New York Press Co., 92 Hun, 515, 37 N. Y. Supp. 45; Robertson v. Same, 2 App. Div. 49, 37 N. Y. Supp. 187.

discount are recoverable as part of the actual damages. But it is otherwise as to profits alleged to have been lost because of the plaintiff's inability to buy goods to be sold. These are too remote and conjectural.[1]

§ 1216. Exemplary damages. Wherever such damages are recoverable at all for malicious wrongs they may be recovered for libel and slander.[2] Whether they may be allowed where the damages are merely nominal is a question upon which the courts are not agreed. In Maine the legal signification of a verdict for nominal damages is, either that there was no actual and express malice entertained by the defendant, or that, if there was, it did the plaintiff no injury. In such a case there is no room for punitive damages.[3] A New York case decided at a special term of the supreme court is in opposition to this view. Gaynor, J., said that he did not think it the law. "A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages. It is in such cases that the rule illustrates its chief value and necessity."[4] To justify the finding of any sum beyond fair compensation for the injury, in order to punish the defendant, the nature of the defamation and circumstances of the case should be such as to satisfy the jury that there was actual malice or a recklessness equivalent thereto.[5] In New York recklessness or careless-

[1] Bradstreet Co. v. Oswald, 96 Ga. 396, 23 S. E. Rep. 423.

[2] It is competent for the legislature to provide that only compensatory damages shall be recovered in actions for libel. Goebeler v. Wilhelm, 17 Pa. Super. Ct. 432.

[3] Stacy v. Portland Pub. Co., 68 Me. 279.

[4] Prince v. Brooklyn Daily Eagle, 16 N. Y. Misc. 186, 189, 37 N. Y. Supp. 250.

[5] Tillotson v. Cheetham, 3 Johns. 56, 3 Am. Dec. 459; Taylor v. Church, 8 N. Y. 452; Symonds v. Carter, 32 N. H. 458; Cramer v. Noonan, 4 Wis. 231; Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360; Kendall v. Stone, 2 Sandf. 269; Gilreath v. Allen, 10 Ired. 67; Bonnin v. Elliott, 19 La. Ann. 322; Kinney v. Hosea, 3 Harr. 397; Montgomery v. Knox, 23 Fla. 595, 3 So. Rep. 211; De Pew v. Robinson, 95 Ind. 109; Newman v. Stein, 75 Mich. 402, 42 N. W. Rep. 956, 13 Am. St. 447; Lanius v. Druggist Pub. Co., 20 Mo. App. 12; Sowers v. Sowers, 87 N. C. 303; Reeves v. Winn, 97 id. 246, 1 S. E. Rep. 448, 2 Am. St. 287; Klewin v. Bauman, 53 Wis. 244, 10 N. W. Rep. 398; Shattuc v. McArthur, 29 Fed. Rep. 136; Orth v. Featherly, 87 Mich. 315, 49 N. W. Rep. 640; Schomberg v. Walker, 132 Cal. 224, 64 Pac. Rep. 290; Callahan v. Ingram, 122 Mo. 355, 26 S. W. Rep.

ness in the publication of a libel is as good ground for awarding punitive damages as is the existence of personal ill-will,[1] and this is probably the general rule. Generally, but not universally, the falsity of a publication which is libelous *per se* is sufficient proof of malice to sustain an award of exemplary damages;[2] and the question of whether they shall be given is

1020, 43 Am. St. 583; Nicholson v. Rogers, 129 Mo. 136, 31 S. W. Rep. 260; Palmer v. Leader Pub. Co., 6 Pa. Dist. Rep. 182; Blackwell v. Landreth, 90 Va. 748, 19 S. E. Rep. 791; Folwell v. Providence Journal Co., 19 R. I. 551, 555, 37 Atl. Rep. 6; Taylor v. Hearst, 107 Cal. 262, 40 Pac. Rep. 392; Westerfield v. Scripps, 119 Cal. 607, 51 Pac. Rep. 958; Nailor v. Ponder, 1 Marvel, 498, 41 Atl. Rep. 88; Blocker v. Schoff, 83 Iowa, 265, 48 N. W. Rep. 1079; Lehrer v. Elmore, 100 Ky. 56, 37 S. W. Rep. 292; Peterson v. Western U. Tel. Co., 72 Minn. 41, 74 N. W. Rep. 1022, 71 Am. St. 461, 40 L. R. A. 661; Palmer v. New York News Pub. Co., 31 App. Div. 210, 215, 52 N. Y. Supp. 539; Smith v. Times Co., 4 Pa. Dist. Rep. 399; Becker v. Public Ledger, 6 Pa. Dist. Rep. 89; Thompson v. McCready, 194 Pa. 32, 45 Atl. Rep. 78; Tillinghast v. McLeod, 17 R. I. 208, 21 Atl. Rep. 345; Born v. Rosenow, 84 Wis. 620, 54 N. W. Rep. 1089; Templeton v. Graves, 59 Wis. 95, 17 N. W. Rep. 672; Smith v. Sun Printing & Pub. Ass'n, 55 Fed. Rep. 240, 5 C. C. A. 91; Press Pub. Co. v. McDonald, 63 Fed. Rep. 238, 11 C. C. A. 155, 26 L. R. A. 531; Bennett v. Salisbury, 78 Fed. Rep. 769, 24 C. C. A. 329; Times Pub. Co. v. Carlisle, 94 Fed. Rep. 762, 36 C. C. A. 475; Tribune Ass'n v. Follwell, 107 Fed. Rep. 646, 46 C. C. A. 526; Hulbert v. New Nonpareil Co., 111 Iowa, 490, 82 N. W. Rep. 928; Courier-Journal Co. v. Sallee, 104 Ky. 335, 47 S. W. Rep. 226.

The manifestation of spite and malice by the defendant's counsel in conducting the trial may sustain an award of exemplary damages. Lamb v. West, 15 N. S. W. L. R. 120, 127.

[1] Smith v. Matthews, 152 N. Y. 152, 46 N. E. Rep. 164; Warner v. Press Pub. Co., 132 N. Y. 181, 185, 30 N. E. Rep. 393; Holmes v. Jones, 121 N. Y. 461, 467, 24 N. E. Rep. 701, 147 N. Y. 59, 67, 41 N. E. Rep. 409, 49 Am. St. 646; Weber v. Butler, 81 Hun, 244, 30 N. Y. Supp. 713; Grant v. Herald Co., 42 App. Div. 354, 59 N. Y. Supp. 84; Payne v. Rouss, 46 App. Div. 315, 61 N. Y. Supp. 705; McMahon v. New York News Pub. Co., 51 App. Div. 488, 64 N. Y. Supp. 713; Crane v. Bennett, 77 App. Div. 102, 79 N. Y. Supp. 66.

Where the defendant published the article without making any inquiry concerning the truthfulness of its charges, it was proper to say to the jury that it was published wantonly, recklessly, and with an utter disregard as to whether it was true or false. Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. Rep. 1009; Potter v. New York Evening Journal Pub. Co., 68 App. Div. 95, 74 N. Y. Supp. 317.

[2] Bergmann v. Jones, 94 N. Y. 51; Samuels v. Evening Mail Ass'n, 75 id. 604; Warner v. Press Pub. Co., 132 id. 181, 30 N. E. Rep. 393; Morning Journal Ass'n v. Rutherford, 51 Fed. Rep. 513, 2 C. C. A. 354, 16 L. R. A. 803; Nicholson v. Merritt, 23 Ky. L. Rep. 2281, 67 S. W. Rep. 5; Gambrill v. Schooley, 93 Md. 48, 48 Atl. Rep. 730; Clark v. North American Co., 203 Pa. 346, 53 Atl. Rep. 237; Childers v. San Jose Mercury Printing &

not to be withdrawn from the jury because the defendant has given evidence tending to show that in fact he bore no malice.[1] The plaintiff may show that defendant was actuated by express malice.[2] Where the matter is of that character injury to the plaintiffs feelings may be considered in awarding such damages.[3] In Connecticut and Ohio the jury may allow them in view of the counsel fees the plaintiff has incurred on account of the wrong done him.[4] It is held in New York that a husband's liability for punitive damages, where he is a defendant simply because of his wife's wrong, is not so broad as that of an actual wrong-doer.[5] But in Texas the husband and his wife are equally liable for her torts, and a general judgment

Pub. Co., 105 Cal. 284, 290, 38 Pac. Rep. 903, 45 Am. St. 40; Evening News Ass'n v. Tryon, 42 Mich. 549, 4 N. W. Rep. 267, 36 Am. Rep. 450; Clements v. Maloney, 55 Mo. 352; Schmisseur v. Kreilich, 92 Ill. 347; Snyder v. Fulton, 34 Md. 128, 6 Am. Rep. 314; Nolan v. Traber, 49 Md. 460, 33 Am. Rep. 277; Colby v. McGee, 48 Ill. App. 294; Hintz v. Graupner, 138 Ill. 158, 27 N. E. Rep. 935; Walker v. Wickens, 49 Kan. 42, 30 Pac. Rep. 181; Callahan v. Ingram, 122 Mo. 355, 26 S. W. Rep. 1020, 43 Am. St. 583; Ferguson v. Chronicle Pub. Co., 72 Mo. App. 462; Arnold v. Sayings Co., 76 id. 159; Van Ingen v. Star Co., 1 App. Div. 429, 37 N. Y. Supp. 114, affirmed without opinion, 157 N. Y. 695; Gray v. Sampers, 35 App. Div. 270, 55 N. Y. Supp. 3; Morrison v. Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Supp. 131. See Stallings v. Whittaker, 55 Ark. 494, 18 S. W. Rep. 829.

There cannot be a recovery of exemplary damages under the Colorado statute providing therefor unless the publication was libelous *per se* and was attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the plaintiff's rights. Republican Pub. Co. v. Conroy, 5 Colo. App. 262, 38 Pac. Rep. 423. A case decided by the St. Louis court of appeals proceeds on the same view, though no statute affected the decision. Nelson v. Wallace, 48 Mo. App. 193, 201. But this case seems to have been disapproved. Fulkerson v. Murdock, 53 Mo. App. 151.

In Wisconsin, though malice is implied from the falsity of the words spoken, exemplary damages are not to be awarded unless there was special ill-will, bad intent or malevolence toward the plaintiff — express malice. Templeton v. Graves, 59 Wis. 95, 17 N. W. Rep. 672; Eviston v. Cramer, 57 Wis. 570, 75 N. W. Rep. 760; Reed v. Keith, 99 Wis. 672, 75 N. W. Rep. 392. Such seems to be the law in Arkansas. Gaines v. Belding, 56 Ark. 100, 19 S. W. Rep. 236.

[1] Gray v. Sampers, *supra*, citing Samuels v. Evening Mail Ass'n, 9 Hun, 288, the dissenting opinion in which was approved in 75 N. Y. 604.

[2] Gambrill v. Schooley, 95 Md. 260, 52 Atl. Rep. 500.

[3] Brooks v. Harrison, 91 N. Y. 83.

[4] Wynne v. Parsons, 57 Conn. 73, and cases cited, p. 84, 17 Atl. Rep. 362; Kahn v. Cincinnati Times-Star, 10 Ohio Dec. 599.

[5] Upton v. Upton, 51 Hun, 184, 4 N. Y. Supp. 936.

may be rendered against them both; it may, however, require that her separate estate be exhausted before resort can be had to their common property or that owned by the husband alone.[1] In a joint action against a publisher and a correspondent for libel exemplary damages should not exceed the sum that ought to be assessed against the defendant who is least culpable, and if only one of the defendants is liable for such damages, none can be recovered.[2] "If two be sued the motive of one must not be allowed to aggravate the damages against the other. Nor should the improper motive of an agent be matter of aggravation against his principal."[3] In some states exemplary damages are not recoverable if the defendant may be criminally prosecuted for the wrong done.[4]

The general rules governing the recovery of exemplary damages and the liability therefor of principals for the acts of their agents are elsewhere considered.[5] It may be convenient to note here some recent cases bearing upon the liability of publishers for the malice and acts of their reporters and correspondents. A newspaper proprietor is not subject to vindictive damages because of the publication of libelous matter without his knowledge or consent, unless proof is made from which his approval thereof may be legally inferred. The absence of proof of reproach administered to the employee who inserted the article, or of his discharge, does not establish a ratification of his act.[6] But if the answer of a corporation substantially reiterates the libel, a finding that its publication was ratified will be sustained.[7] In the absence of negligence the owner of a newspaper is not chargeable with the express malice of an employee, if he had no knowledge that the false accusation was to be made;[8] but if the employee stands in the place of

[1] Zeliff v. Jennings, 61 Tex. 458.

[2] Hearne v. De Young, 119 Cal. 670, 681, 52 Pac. Rep. 150.

[3] Bigelow's Odgers on Libel & Slander, 296; Krug v. Pitass, 162 N. Y. 154, 56 N. E. Rep. 526, 76 Am. St. 317. But see Clifford v. Press Pub. Co., 78 App. Div. 79, 79 N. Y. Supp. 767, and cases cited.

[4] Tracy v. Hacket, 19 Ind. App. 133, 49 N. E. Rep. 185, 65 Am. St. 398. See § 402.

[5] Ch. 9.

[6] Haines v. Schultz, 50 N. J. L. 481, 14 Atl. Rep. 488.

[7] Tribune Ass'n v. Follwell, 107 Fed. Rep. 646, 46 C. C. A. 526.

[8] Detroit Post Co. v. McArthur, 16 Mich. 447; Scripps v. Reilly, 38 id. 10; Robertson v. Wylde, 2 M. & R. 101; Eviston v. Cramer, 57 Wis. 570, 15 N. W. Rep. 760.

the employer and has entire control of a newspaper or a portion of it he is thereby practically authorized to write and publish therein anything he may choose, and the latter cannot claim exemption from any of the legal consequences of the former's acts, whether they are the result of negligence or wilfulness.[1] In answer to the contention that a corporation was not subject to punitive damages on account of the acts of its agents the court said: But the charges published were gathered and circulated in the course of the defendant's ordinary business by its agents who were acting within the scope of the authority given them, and for acts done by the agents of a corporation in the course of its business and of their employment a corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances.[2] In Michigan an award of exemplary damages has been sustained against a newspaper because its reporter was informed of the falsity of the statements published before publication was made.[3]

§ 1217. Damages in discretion of jury. The amount of damages in these cases, both compensatory and exemplary, is in the discretion of the jury; and being so, the verdict must be palpably and grossly excessive to induce the court to set it aside.[4]

[1] Bruce v. Reed, 104 Pa. 408, 49 Am. Rep. 586; Malloy v. Bennett, 15 Fed. Rep. 371; Hoboken Printing & Pub. Co. v. Kahn, 59 N. J. L. 218, 35 Atl. Rep. 1053; McMahon v. Bennett, 31 App. Div. 16, 52 N. Y. Supp. 390. See Bennett v. Salisbury, 78 Fed. Rep. 769, 24 C. C. A. 329.

[2] Times Pub. Co. v. Carlisle, 94 Fed. Rep. 762, 36 C. C. A. 475, 487.

[3] Hatt v. Evening News Ass'n, 94 Mich. 114, 53 N. W. Rep. 952.

[4] Jones v. Greeley, 25 Fla. 629, 645, 6 So. Rep. 448; Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. Rep. 103; Lanius v. Druggist Pub. Co., 20 Mo. App. 12; Templeton v. Graves, 59 Wis. 95, 17 N. W. Rep. 672; Grace v. McArthur, 76 Wis. 641, 45 N. W. Rep. 518; Malloy v. Bennett, 15 Fed. Rep. 371; Shattuc v. McArthur, 29 id. 136; Praed v. Graham, 24 Q. B. Div. 53; Lowe v. Herald Co., 6 Utah, 175; Douglass v. Tousey, 2 Wend. 352; King v. Root, 4 id. 113, 21 Am. Dec. 102; Sanders v. Johnson, 6 Blackf. 50, 36 Am. Dec. 564; Bell v. Howard, 4 Litt. 117; Riley v. Nugent, 1 A. K. Marsh. 431; Ross v. Ross, 5 B. Mon. 20, 30 Am. Dec. 669; Blume v. Scheer, 83 Minn. 409, 86 N. W. Rep. 446; Gaines v. Belding, 56 Ark. 100, 104, 19 S. W. Rep. 236; Sherwood v. Kyle, 125 Cal. 652, 58 Pac. Rep. 270; McNally v. Burleigh, 91 Me. 22, 39 Atl. Rep. 285; Bishop v. Journal Newspaper Co., 168 Mass. 327, 47 N. E. Rep. 119; Manget v. O'Neill, 51 Mo. App. 35; Unterberger v. Scharff, id. 102; Arnold v. Sayings Co., 76 id. 159; Holmes v. Jones, 147 N. Y. 59, 41 N. E. Rep. 409, 49 Am. St. 646, 69 Hun, 346, 23 N.

§ 1218. Special damages when words not actionable per se. Defamatory language from the false speaking or [662] publication of which damage is not inferred may be the basis

Y. Supp. 631; Scott v. Sun Printing & Pub. Ass'n, 74 Hun, 284, 26 N. Y. Supp. 690; Davey v. Davey, 22 N. Y. Misc. 668, 50 N. Y. Supp. 161; Smith v. Times Co., 4 Pa. Dist. Rep. 399; Palmer v. Leader Pub. Co., 7 Pa. Super. Ct. 594; Luft v. Lingane, 17 R. I. 420, 22 Atl. Rep. 942; Turner v. Stevens, 8 Utah, 75, 30 Pac. Rep. 24; Times Pub. Co. v. Carlisle, 94 Fed. Rep. 762, 36 C. C. A. 475, 482; Brown v. Vannaman, 85 Wis. 451, 55 N. W. Rep. 183, 39 Am. St. 860; Cooper v. Sun Printing & Pub. Ass'n, 57 Fed. Rep. 566; Brown v. Syme, 16 Vict. L. R. 392.

In Newell on Defamation, pp. 912–927, is a collection of cases in which verdicts have been sustained or set aside because the damages awarded were not excessive or were so. See Harris v. Arnott, 26 L. R. Ire. 55.

Verdicts have been set aside because excessive in the following recent cases: Libby v. Fowle, 90 Me. 262, 38 Atl. Rep. 171; Peterson v. Western U. Tel. Co., 65 Minn. 18, 67 N. W. Rep. 646, 33 L. R. A. 302, 75 Minn. 368, 77 N. W. Rep. 985; Gray v. Times Newspaper Co., 78 Minn. 323, 81 N. W. Rep. 7; Bee Pub. Co. v. World Pub. Co., 59 Neb. 713, 82 N. W. Rep. 28; White v. Newcomb, 25 App. Div. 397, 49 N. Y. Supp. 704; Bank v. Bowdre, 92 Tenn. 723, 742, 23 S. W. Rep. 131; Reed v. Keith, 99 Wis. 672, 75 N. W. Rep. 392; Crane v. Bennett, 77 App. Div. 102, 79 N. Y. Supp. 66.

In Louisiana if a verdict in favor of the plaintiff is worse than inadequate, as by being equivocal, it will be increased. Mequet v. Silverman, 52 La. Ann. 1369, 27 So. Rep. 885. The supreme court increased a verdict for one dollar to three hundred dollars. In Simpson v. Robinson, 104 La. 180, 28 So. Rep. 908, a verdict for twenty-five dollars was increased to five hundred dollars.

In Blackwell v. Landreth, 90 Va. 748, 19 S. E. Rep. 791, a verdict was set aside because it was inadequate.

The result of adjudications in Michigan is thus stated in Scripps v. Reilly, 38 Mich. 23: "1. In any injury entitling the party to redress, damages to the person, property and reputation, together with such special damage as may be shown, are recoverable. 2. Where the act done is one which from its very nature must be expected to result in mischief, or where there is malice, or wilful or wanton misconduct, carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others, a new element of damages is allowed, viz.: for injury to the feelings of the plaintiff. 3. Damages for injuries to feelings are only allowed for those torts which consist of some voluntary act or very gross neglect, and depend in amount very much upon the degree of fault evinced by all the circumstances. 4. Where the tort consists of some voluntary act, but no element of malice is shown to have existed, but the wrong was done in spite of proper precaution, the damages to be awarded on account of injured feelings will be reduced to such sum as must inevitably have resulted from the wrong itself. 5. Where, however, the elements exist in a case entitling a party to recover damages for injured feelings, the amount to be allowed for shame, mental anxiety, insulted honor, and suffering and indignation consequent on the wrong, may be increased or aggra-

of an action if injury results.[1] The injury must be of a pecuniary nature, or cause detriment to important temporal interests, must have accrued when the suit was begun and must appear to be the natural and proximate consequence of the publication.[2] This kind of slander is only actionable in respect [663] of some special damage proceeding from it; such damage is the gist of the action and must be specially alleged and proved or the action will fail.[3] There is some contrariety of

vated by the vindictive feelings, or the degree of malice, recklessness, gross carelessness or negligence of the defendant, as the injury is much more serious where these elements, or either of them, are shown to have existed. 6. This increase of damages dependent upon the conduct of the defendant must be considered in this state as actual damages, although usually spoken of as exemplary, vindictive or punitory, and the amount thereof to be recovered, where recoverable at all, as they are incapable of ascertainment by any other known rule, must rest in the fair and deliberate judgment and discretion of the jury acting upon their own sense of justice in view of all the circumstances, both mitigating and aggravating, appearing in the case, and which can fairly be said to give color to or characterize the act, aided, however, by such instructions from the court as will tend to prevent the allowance of damages merely fanciful, or so remote as not fairly resulting from the injury. 7. So far as these damages are concerned, the fact that an indictment may or may not be pending or threatened for the same wrong is wholly immaterial, as they are allowed by way of remuneration for the injury sustained. If this allowance also operates by way of punishment, this is an indirect result equally applicable to damages allowed for injuries to person or property. 8. In cases of libel the publication is always considered a voluntary act, and is presumed to have proceeded from malicious motives. The actual motive may, however, be shown either in aggravation or reduction of damages to the feelings of the person injured. In other words, the spirit and intention of the defendant in publishing the libel may be considered by the jury in estimating the injuries done to the plaintiff's feelings. 9. Want of proper precaution in the employment of agents or assistants, or of proper care in the conduct of the paper, or the retention of improper employees after ascertaining their incompetency, carelessness or negligence, may be shown to increase the damages to wounded feelings; but express malice in the employees would not be admissible for such purpose, where the act was done without the knowledge or consent of the defendant, when proper care had been exercised in their employment and retention. Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Welch v. Ware, 32 Mich. 77, and authorities cited on p. 86; Elliott v. Van Buren, 33 Mich. 56, 20 Am. Rep. 668; Livingston v. Burroughs, 33 Mich. 511; Friend v. Dunks, 37 Mich. 25."

[1] Terwilliger v. Wands, 17 N. Y. 54.

[2] Dun v. Weintraub, 111 Ga. 416, 420, 36 S. E. Rep. 808, 50 L. R. A. 670; Newell on Defamation, etc., 849, § 17.

[3] Achorn v. Piper, 66 Iowa, 694, 24 N. W. Rep. 513; Woodruff v. Bradstreet Co., 35 Hun, 16; Chamberlain v. Boyd, 11 Q. B. Div. 407;

decision as to what will constitute special damage sufficient to support an action. There is none, however, where the direct or necessary consequence is confessedly a pecuniary loss.

Dominion Tel. Co v. Silver, 10 Can. Sup. Ct. 238; Dwyer v. Meehan, 18 L. R. Ire. 138; Keenholts v. Becker, 3 Denio, 346; Terwilliger v. Wands, 17 N. Y. 61; Beach v. Ranney, 2 Hill, 309; Hallock v. Miller, 2 Barb. 630; Herrick v. Lapham, 10 Johns. 281; Hersh v. Ringwalt, 3 Yeates, 508, 2 Am. Dec. 392; Dun v. Weintraub, *supra;* Erwin v. Dezell, 64 Hun, 391, 19 N. Y. Supp. 784; Smid v. Bernard, 31 N. Y. Misc. 35, 63 N. Y. Supp. 278; Langdon v. Shearer, 43 App. Div. 607, 60 N. Y. Supp. 193; Fry v. McCord. 95 Tenn. 678, 33 S. W. Rep. 568, citing the text. See Missouri Pacific R. Co. v. Richmond, 73 Tex. 568, 576, 11 S. W. Rep. 555, 15 Am. St. 794, 4 L. R. A. 280.

In Cook v. Cook, 100 Mass. 194, the court say: "To sustain the action on this ground it is necessary that the declaration should set forth precisely in what way such special damages resulted from the words relied on. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that he has been put to great costs and expenses thereby. . . . It must be made to appear, by proper averments, how these special damages were occasioned by the words alleged to have been uttered falsely or maliciously." Walker v. Tribune Co., 29 Fed. Rep. 827; Pollard v. Lyon, 91 U. S. 225.

An allegation that the words were spoken with the intent to destroy the plaintiff's business as a school teacher is not a sufficient averment of special damage. Ledlie v. Wallen, 17 Mont. 150, 42 Pac. Rep. 289.

Special damages are not well pleaded by allegations to the effect that there was an unsettled account against the plaintiff, that he was damaged in a specified sum, and that the purpose of the libel was to cause him to be suspected and believed to be without integrity and unworthy of credit or public confidence and social intercourse; that he was greatly injured in his good name and credit, brought into public scandal, infamy and disgrace, and was prevented from procuring any of the necessaries of life, has suffered great anxiety and pain of mind and become incapacitated for business. Fry v. McCord, 95 Tenn. 678, 33 S. W. Rep. 568.

It is said in Cooley on Torts (2d ed.), p. 242, that besides the publications libelous *per se*, any untrue and malicious charge which is published in writing or print is libelous when damage is shown to have resulted as a natural and proximate consequence. The Iowa court regard this as a correct statement of the rule. "If it be conceded, however, that there cannot be an action for libel unless the words are defamatory, still the plaintiff may be entitled to relief under the allegations of his petition, although he may call it an action for libel. If one intentionally causes temporal loss or damage to another without justifiable cause and with malicious purpose to inflict it, the other may recover, in an action of tort, the damage he has sustained as a natural and proximate consequence of the wrong." Hollenbeck v. Ristine, 105 Iowa, 488, 490, 75 N. W. Rep. 355, 61 Am. St. 306, citing Walker v. Cronin, 107 Mass. 555; Lucke v. Clothing Cutters' & Trimmers' Assembly, 77 Md. 396, 26 Atl. Rep. 505, 39 Am. St. 421, 19 L. R. A. 408; Chipley v. Atkinson, 23 Fla. 206, 1 So. Rep. 940, 11 Am. St. 367.

Strong, J., in Terwilliger v. Wands,[1] said: "The action for slander is given by law as a remedy for injuries affecting a man's reputation or good name by malicious, scandalous words, tending to his damage and derogation.[2] It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable *per se* the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. But with regard to words that do not apparently, and upon the face of them, import such defamation as will of course be injurious it is necessary that the plaintiff should aver some particular damage to have happened.[3] As to what constitutes special damage Starkie mentions the loss of a marriage, loss of hospitable gratuitous entertainment, preventing a servant or bailiff from getting a [664] place, the loss of customers by a tradesman;[4] and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient.[5] In Olmsted v. Miller[6] it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in Williams v. Hill[7] was the fact that the plaintiff was turned away from the house of her uncle and charged not to return until she had cleared up her character. So in Beach v. Ran-

[1] 17 N. Y. 54.

[2] 3 Black. Com. 123; Stark. on Slander, Prelim. Obs. 22–29; id. 17, 18.

[3] 3 Black. Com. 124.

[4] Townshend on Slander & L., § 198. Special damage consists in, among other things, the loss of marriage, loss of *consortium* of husband and wife (Lynch v. Knight, 5 L. T. Rep. (N. S.) 291, 9 H. of L. Cas. 577; Parkins v. Scott, 6 L. T. Rep. (N. S.) 394, 1 Hurl. & C. 153; Roberts v. Roberts, 33 L. J. (Q. B.) 249, 5 B. & S. 384; and see Pasman v. Fletcher, Clayton, 73); loss of emoluments, profits, customers, employment, gratuitous hospitality (Moore v. Meagher, 1 Taunt. 39; Williams v. Hill, 19 Wend. 305); or by being subjected to any other inconvenience or annoyance occasioning or involving an actual or constructive pecuniary loss. Woodbury v. Thompson, 3 N. H. 194; Kelly v. Partington, 3 Nev. & M. 116; Keenholts v. Becker, 3 Denio, 346; Foulger v. Newcomb, L. R. 2 Ex. 330; Hartley v. Herring, 8 T. R. 130. The special damage must be the loss of some material temporal advantage. Loss of *consortium vicinorum* is not sufficient. Roberts v. Roberts, 33 L. J. (Q. B.) 250; Beach v. Ranney, 2 Hill, 309.

[5] Citing Stark. on Slander, 195, 202; Cook's Law of Def. 22–24.

[6] 1 Wend. 506.

[7] 19 Wend. 305.

ney [1] the circumstance that persons who had been in the habit of doing so refused longer to supply fuel, clothing, etc.[2] . . . It would be highly impolitic to hold all language wounding the feelings and affecting unfavorably the health and ability to labor of another a ground of action; for that would be to make the ground of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature, and must in fact disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result."[3] It is therefore generally held that mere injury to the feelings, though resulting in sickness and inability to labor, is not such special damage as will support the action for defamatory words not actionable in themselves.[4] [665] Nor will the allegation that the plaintiff has fallen into disgrace, contempt and infamy and has lost his or her credit, reputation and peace of mind.[5] Being shunned by [666] neighbors and turned out of a moral reform society do not constitute special damages.[6]

[1] 2 Hill, 309.

[2] 2 Stark. on Slander, 872, 873.

[3] See Field v. Colson, 93 Ky. 347, 20 S. W. Rep. 264.

[4] Prince v. Eastwood, 45 Iowa, 648; Wilson v. Goit, 17 N. Y. 442; Bedell v. Powell. 13 Barb. 183; Samuels v. Evening Mail Ass'n, 6 Hun, 5; Allsop v. Allsop, 5 H. & N. 534. But see Olmsted v. Brown, 12 Barb. 657; Bradt v. Towsley, 13 Wend. 253; Fuller v. Fenner, 16 Barb. 333; Underhill v. Welton, 32 Vt. 40; McQueen v. Fulghan, 27 Tex. 463; Fry v. McCord, 95 Tenn. 678; 33 S. W. Rep. 568.

[5] 1 Saund. 243, note 5; Beach v. Ranney, 2 Hill, 309; Bassett v. Elmore, 48 N. Y. 561; Woodbury v. Thompson, 3 N. H. 194; Roberts v. Roberts, 5 B. & S. 384; Rea v. Harrington, 58 Vt. 181, 2 Atl. Rep. 475, 56 Am. Rep. 561; Fry v. McCord, *supra*.

[6] Id.

§ 1219. Same subject. The loss of a marriage to a party of either sex is sufficient special damage. If the words spoken were defamatory, as that a female plaintiff has had an illegitimate child or is wanting in chastity;[1] or, if spoken of a man, that he is a whore-master or the like;[2] or of one who is a widower that he had kept his wife basely and starved or denied her necessaries;[3] or to say of one he is a bastard,[4] and it is shown to be followed with the loss of marriage as a consequence, the action will lie. But a loss of suitors is not special damage to a female.[5] The judges in England were not agreed in Lynch v. Knight[6] that a wife may maintain an action against a slanderer for words not actionable in themselves based on the loss of her husband's society as special damage, he having deserted her in consequence of the words spoken; but she was held entitled to recover in respect of her loss of maintenance by him for such cause. Loss of employment, of customers or of any position from which the defamed party derived support or any substantial or pecuniary advantage is so manifestly special damage that it is unnecessary to state the [667] cases in detail.[7] In such actions where loss of trade or customers is relied upon if the plaintiff intends to show particular instances he must allege them;[8] in other words, where he alleges by way of special damages the loss of customers in the way of his trade, the loss of marriage or of service, the

[1] Restor v. Pomfreich, Cro. Eliz. 639; Shepard v. Wakeman, 1 Sid. 79; Davis v. Gardiner, 4 Coke, 16; Matthews v. Cross, Cro. Jac. 323.

[2] Matthews v. Cross, Cro. Jac. 323; Taylor v. Tully, Palmer, 385; Southold v. Daunston, Cro. Car. 269.

[3] Wicks v. Shepherd, Cro. Car. 155.

[4] Nelson v. Staff, Cro. Jac. 422.

[5] Barnes v. Prudlin, 1 Sid. 396.

[6] 9 H. of L. Cas. 577.

[7] Campbell v. White, 5 Ir. C. L. (N. S.) 312; Corcoran v. Corcoran, 2 id. 272; Moore v. Meagher, 1 Taunt. 39; Hartley v. Herring, 8 T. R. 130; Peaks v. Oldham, 1 Cowp. 277; Bignell v. Buzzard, 3 H. & N. 217; Sterry v. Foreman, 2 C. & P. 592; Evans v. Harries, 1 H. & N. 25; Knight v. Gibbs, 3 Nev. & M. 467, 1 Ad. & E. 43; Shipman v. Burrows, 1 Hall, 399; Williams v. Hill, 19 Wend. 305; Wemhak v. Morgan, 20 Q. B. Div. 635: Hollenbeck v. Ristine, 105 Iowa, 488, 75 N. W. Rep. 355, 67 Am. St. 306; Giacona v. Bradstreet Co., 48 La. Ann. 1191, 20 So. Rep. 706; Weston v. Barnicoat, 175 Mass. 454, 56 N. E. Rep. 619, 49 L. R. A. 612.

[8] Rose v. Groves, 5 M. & G. 618; Trenton Mut. L. & F. Ins. Co. v. Perrine, 23 N. J. L. 402, 57 Am. Dec. 400; Moore v. Meagher, 1 Taunt. 39; Shipman v. Burrows, 1 Hall, 399; Tobias v. Harland, 4 Wend. 537; Hallock v. Miller, 2 Barb. 630; Townshend on Slander & L., § 345; 1 Stark. on Slander, 203.

names of such customers, the name of the person with whom marriage would have been contracted or service performed, should be stated.[1] But the rule is relaxed when the individuals may be supposed to be unknown to him, or it is impossible to specify them, or they are so numerous as to excuse a specific description on the score of inconvenience.[2]

[1] Id.; Bradstreet Co. v. Oswald, 96 Ga. 396, 23 S. E. Rep. 423.

[2] Trenton Mut. L. & F. Ins. Co. v. Perrine, 23 N. J. L. 402, 57 Am. Dec. 400; Hartley v. Herring, 8 T. R. 130; Hargrave v. Le Breton, 4 Burr. 2422; Westwood v. Cowne, 1 Stark. 172; 2 Saund. 411; Riding v. Smith, 1 Ex. Div. 91. See Hewit v. Mason, 24 How. Pr. 366.

In Weiss v. Whittemore, 28 Mich. 373, the publication was actionable *per se*, and had reference to the plaintiff in his business as a dealer in Steinway pianos. The declaration alleged that prior to the time of the publication he had been and was carrying on the business of the agency, "and had in the way of his aforesaid trade and business, as agent for the sale of the Steinway pianos, acquired great gains and profits, and was up to that time daily and honestly acquiring great gains and profits to himself, as such agent in the sale thereof." It was further alleged that by means of the publication the plaintiff had been and is greatly injured in his said trade and business, and has lost and been deprived of divers great gains and profits in his said business, which would but for such publication have arisen and accrued to him. It was objected that these allegations were too general; that the plaintiff should have shown how he had suffered the damage, the particular amount, and the particular sales the publication had prevented him from making. But the court, by Christiancy, J., said: "The case is not like that of Shipman v. Burrows, upon which the defendants rely, where the plaintiff, a shipmaster, alleged generally that in consequence of the publication, etc., certain insurance companies refused to insure any vessel commanded by him, or any goods on board, etc., without setting forth any particular application to or refusal by any such company. In that case, whether correctly decided or not, the plaintiff must have known and could therefore easily have set forth the particular instance of refusal. But how could the plaintiff thus know and specify the particular instances here where parties simply omitted to call for the purchase of these pianos? Had he been in the habit of carrying them around to supply customers, perhaps the case might have been analogous to that of the shipmaster; but this does not appear. Nor is this like the loss of trade from such a cause in many other cases, where the same customers are in the habit of resorting to the same shop for dry goods or groceries frequently needed; pianos are not bought at frequent but at very distant intervals by the same person. Almost every customer must, in the nature of things, be a new one. And yet when the injury complained of is a loss of trade, in ordinary cases, from slander or a libel, it seems to be settled upon authority, and we think upon sound principle, that the names of the customers driven away or lost need not be mentioned; but the general loss of trade is sufficient, and the declaration may be supported by evi-

[668] § **1220. Same subject; injury to feelings.** There ought to be no difference, and in principle there is none, between words actionable in themselves and other defamatory words followed by actual injury beyond the change in the burden of proof. In the former case the injury is presumed; in the latter it must be alleged and proved. The intrinsic nature of the wrong and injury is the same in both cases. What the jury may take into consideration without proof in the one case in the assessment of damages ought, when proved in the other, to sustain the action and be considered in the award thereof.[1] Where the words relate to persons, and not exclusively to things, and impute a crime involving moral turpitude or punishment they are in themselves actionable. The law conclusively presumes damage if they are false and the publication was not privileged. This damage is assessable by a jury, and no legal standard for measuring it exists. This, however, does not imply, nor is it true, that the law does not define the nature of the injury and decide what elements may enter into compensation for it. The injury is a malicious one to reputation[2] and pecuniary loss, in theory at least, the gist of the action for its redress.[3] This loss is presumed; and also injury to the feelings because the dissemination of the scandal has a tendency, more or less strong according to the nature of the imputation and the standing and influence of the traducer, to exclude the person to whom it refers from society and the [669] confidence and respect of the community; there is in fact and by implication of law mental suffering at once upon knowledge of the defamatory publication. The law authorizes the jury to consider upon their knowledge of the general experience that the false and malicious imputation, however limited the publication, causes injury of which mental suffering is an ingredient; that suffering ensues from the shock of the disparagement to the mental sensibilities of one who has a consciousness of innocence, and from the natural apprehen-

dence of such general loss. See Evans v. Harries, 38 Eng. L. & Eq. 347; Hartley v. Herring, 8 T. R. 130; Ashley v. Harrison, 1 Esp. 48; Trenton, etc. Ins. Co. v. Perrine, 23 N. J. L. 402, 57 Am. Dec. 400;" § 1223.

[1] The text is quoted with approval in Turner v. Stevens, 8 Utah, 75, 30 Pac. Rep. 24.

[2] Terwilliger v. Wands, 17 N. Y. 54.

[3] Townshend on Slander & L., § 57.

sion that his reputation will suffer by a popular belief or suspicion that the imputation is true. This injury to the feelings is not the principal ingredient for which the law affords redress; it is incidental to and dependent on other phases of the wrong; it is generally rather an aggravation than a substantive and independent ground of recovery. If the law would sustain an action and allow the recovery of damages for every word or act which in fact causes injury to feelings it would thereby, in the language of Crompton, J.,[1] "encourage actions which ought not to be brought." Therefore, in actions for words not actionable in themselves special damage of a nature corresponding to the damages which are presumed to result principally from language actionable *per se* must be alleged and proved; and it is only when, in addition to such loss, the words are of such a nature as to injure reputation that injury to the feelings or mental suffering may be incidentally considered.[2] A mere apprehension of loss or of ill consequences will not constitute special damages to support an action for slanderous words not actionable. It is insufficient to allege that in consequence of the words discord happened between husband and wife and that plaintiff was in danger of being divorced; or that the words exposed the plaintiff to the displeasure [670] of her parents and she was in danger of being put out of their house.[3]

§ 1221. Same subject; natural consequence. The special damage must be the natural as well as the proximate consequence of the defamatory publication. As was well said by Mullett, J.:[4] "It is a rule equally consistent with good sense,

[1] Roberts v. Roberts, 5 B. & S. 384.

[2] Falsely and maliciously to impute in the coarsest terms, and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be maintained for saying that a cobbler is unskilful in mending shoes, or that one has held up his hand in a threatening posture to another. Report of committee of house of lords on defamation and libel, July, 1843; Townshend on Slander & L., § 57.

If portions of the language used are actionable *per se* the plaintiff may testify that its publication caused him mental suffering. Laing v. Nelson, 40 Neb. 252, 58 N. W. Rep. 846.

[3] Folkard's Stark. on Slander, § 385; Barnes v. Strudd, 1 Lev. 261; Townshend on Slander & L., § 200.

[4] Olmsted v. Brown, 12 Barb. 652.

good logic and good law that a person who would recover damages for an injury occasioned by the conduct of another must show, as an essential part of his case, the relation of cause and effect between the conduct complained of and the injury sustained." This subject has been treated at large in another place.[1] The injury must be such as, according to the usual course of things or the general experience of mankind, was likely to ensue from the publication complained of. It is not deemed natural for a parent to withhold favors in the way of instruction and dress to his minor child in consequence of a charge of self-pollution which he disbelieves.[2] Grover, J., said: "I do not think special damages can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge made by the defendant, that constitutes the damage which the law redresses." When, however, the charge made, independently of belief of its truth, has caused the person to whom it was published or addressed to [671] act upon it and to turn out of employment a servant to whom the charge referred, the disbelief, or testimony of it, has been held immaterial.[3] "It may often happen," say the court, "that a person may not believe what is told, and yet not have courage to keep the individual who labors under the imputation." Park, J., observed: "It is said that the witness would have turned the plaintiff away on the defendant's wish to that effect being intimated although no slanderous words had been used. But it is clear that if the words in question

[1] § 29.

[2] Anonymous, 60 N. Y. 262, 19 Am. Rep. 174.

In Lynch v. Knight, 9 H. of L. Cas. 577, the wife brought the action, joining the husband for conformity, against A. for slander uttered by him to her husband, imputing to her that she had been "all but seduced by B. before her marriage, and that her husband ought not to suffer B. to visit his house." The special damage alleged was that in consequence of the slander the husband had compelled her to leave his house and return to her father, whereby she lost the *consortium* of her husband. It was held that the cause of complaint thus set forth would not sustain the action, inasmuch as the special damage relied upon did not arise from the natural and probable effect of the words spoken by the defendant, but from the precipitation or idiosyncrasy of the husband in dismissing his wife from his house when he was only cautioned not to let her mix in society. Folkard's Stark. on Slander, § 383.

[3] Knight v. Gibbs, 1 Ad. & E. 43.

had not been used the plaintiff would not have been dismissed; and it is sufficient for this action to show that she was turned out in consequence of such words of the defendant. The effect of the evidence may be that the witness would have turned the plaintiff away if different words had been used; but different words were not used, and she was sent away in consequence of these." The loss of a seat in the legislature and the emoluments of the office, by reason of the libel of a candidate therefor, is too remote, uncertain and speculative to be a ground of damage.[1] In many cases the special injury results from the action of one to whom the slanderous charge has been repeated by the person to whom the defendant published it. And it has been held that the defendant is not liable for the damage resulting from such repetition unless he authorized it or it was a privileged communication. Thus it is said by Strong, J., in Terwilliger v. Wands,[2] that "where words are spoken to one person, and he repeats them to another, in consequence of which the party of whom they are spoken suffers damage, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition, and the party who repeats them is alone liable for the damages."[3]

[1] Field v. Colson, 93 Ky. 347, 20 S. W. Rep. 264.

[2] 17 N. Y. 57.

[3] Citing Ward v. Weeks, 7 Bing. 211; Hastings v. Palmer, 20 Wend. 225; Keenholts v. Becker, 3 Denio, 346; Stevens v. Hartwell, 11 Met. 542.

In Olmsted v. Brown, 12 Barb. 662, Mullett, J., said: "A man may be justly held responsible for the necessary or ordinary legitimate consequences of his own acts. And such consequences may be included in the chain of causes which connect the original act with the final effect. But he cannot be made accountable for the unauthorized illegal acts of other persons, although his own conduct may have indirectly induced or incited the commission of the acts." Vicars v. Wilcocks, 8 East, 1; Moody v. Baker, 5 Cow. 357; Beach v. Ranney, 2 Hill, 314; McPherson v. Daniels, 10 B. & C. 263; Dole v. Lyon, 10 Johns. 447, 6 Am. Dec. 346. He adds: "These decisions, and the reasons upon which they are founded, most clearly and fully establish the doctrine that the repetition of slander is unlawful, unless made with justifiable intentions and upon a justifiable occasion. And the conclusion is inevitable, that, when so unlawful, it is not an ordinary or necessary legitimate consequence of the defendant's original unlawful act, and cannot be

[672] **§ 1222. Criticism of the doctrine last stated.** It appears to the writer that this doctrine, though advanced by very able jurists and sanctioned by courts of distinguished learning and influence, is unsound. If the liability of the party first uttering the defamatory words for the damages resulting from a culpable repetition of them were denied on the ground that such repetition was not a natural or probable consequence of the first publication the conclusion would harmonize with the principle which fixes the limit of responsibility generally for the consequences of torts.[1] An error in holding that the repetition of a scandal is not so likely to occur as that the utterer should be held to contemplate it is of minor consequence; if that holding were true the exemption from liability could be rested safely on that ground. The damages would then be rejected as too remote. But it is not true, probably, that when one utters a scandal he expects it to have no further circulation; that a subsequent repetition by his hearer is a consequence so contrary to the general experience that he cannot be reasonably held responsible for it. The relation of cause and effect is a matter which cannot always be actually ascertained; but if in the ordinary course of events a certain result usually fol-
[673] lows from a given cause the immediate relation of one

used to make out the relation of cause and effect between the defendant's original slander and the injury attributed to it, and which might not have happened but for the unjustifiable and illegal interference of another. This rule presupposes what the law plainly declares, that there may be intentions and occasions which will justify the repetition of slanderous words. And those who duly appreciate the rights of the social, domestic, religious, and mere business relations of civilized life will find no difficulty in judging when these occasions occur. Where they do occur, the repetition of slanderous words, with the proper intentions, may be considered the ordinary or necessary and legitimate consequences of the uttering by the first slanderer, and render him accountable for all the injuries occasioned by such legitimate repetition."

The proposition in the text is sustained in Prince v. Eastwood, 45 Iowa, 640; Clifford v. Cochrane, 10 Ill. App. 570; Burkett v. Griffith, 90 Cal. 532, 27 Pac. Rep. 527, 25 Am. St. 151; Hastings v. Stetson, 126 Mass. 329, 30 Am. Rep. 683; Gough v. Goldsmith, 44 Wis. 262, 28 Am. Rep. 579; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 247, 28 N. E. Rep. 1, 13 L. R. A. 97.

[1] There cannot be a recovery for the damages resulting from a particular republication, nor can damages be enhanced by the general probability of unlawful republications. Burt v. Advertiser Newspaper Co., 154 Mass. 238, 247, 28 N. E. Rep. 1, 13 L. R. A. 97.

to the other may be considered to be established.[1] The cases from the doctrine of which we dissent do not hold that the damages suffered from such repetition are remote within this rule, though in many cases particular losses may be so; they hold that such damages do not naturally and legitimately proceed from the first speaking, and that if the repetition occurs under such circumstances that the person who repeats the scandal incurs no liability the damages resulting therefrom may be charged to the first speaker and are not remote. It is possible to suppose that the first utterer of the imputation might reasonably be held to anticipate an injurious privileged repetition, though not a wrongful one; but to hold him liable for the former on that ground, and not for the latter, would be to make his liability depend on a subtile and shadowy distinction. Whether a repetition was likely to ensue under the particular circumstances of a given case is often, and perhaps generally, a proper question for the jury, as whether alleged consequences were antecedently probable in other cases of tort. Whether a particular special injury sought to be made an element of damage is a natural and proximate consequence of a repetition of the slanderous charge is a question of law. But the doctrine that where the repetition is unlawful and the person repeating the defamatory words is liable therefor, no recourse can be had to an earlier publisher of the scandal and that redress must be sought exclusively against the person who is the more immediate cause of the injury is unsound. Each is liable for the natural and proximate consequences of his acts; neither is relieved from this responsibility because the other is the more immediate agent to produce those consequences, and acted tortiously and illegally in doing so. Many illustrations of such double liability might be mentioned.[2] Where a marriage promise is broken in consequence of one of the parties being traduced there is a right of action for such breach of the promise; but this has never been supposed to to preclude an action against the slanderer who induced that breach. The loss of the marriage is a recognized element of damages in the latter action, though it is the very loss [674]

[1] Ionides v. Universal Ins. Co., 14 C. B. (N. S.) 259.

[2] See §§ 29, 39, 41, 42.

to be compensated in the other.[1] It has been well said by Gilfillan, C. J., that although one who publishes a libel is not to be held responsible for an independent wrong done by a third person, though connected with the libel, he is responsible for the natural consequences of his own wrong act, although the wrongful act of a third person may concur in bringing about such consequences. If it were a natural consequence of the defendant's publication through the newspaper that some evil-disposed person should send a copy of the paper, or the item cut from the paper, to some one whom the defendant had not thought of its reaching, he would be liable for it as the consequences of his own wrong.[2] It was for the jury to say whether sending the postal card by a third person was a natural consequence of the defendant's publication in the newspaper.[3]

§ 1223. Slander of title. Defamatory language maliciously spoken of things is actionable only when it naturally and proximately causes damage to the owner.[4] The language must be false, spoken without legal excuse, and occasion pecuniary damage.[5] The malice which gives a right of action is legal as contradistinguished from personal malice, and may consist in uttering false statements either with a direct intention to injure another or in a reckless disregard of his rights and of the consequences that may result to him.[6] Misrepresentations by which a business is intentionally injured constitute a tort for which the law affords redress. Such torts are akin to slander and libel; but they are remediable within the broad principles

[1] Folkard's Stark. on Slander, § 386, and note (a); Townshend on Slander & L., § 201; Lumley v. Gye, 2 El. & B. 216; Green v. Button, 2 Cr., M. & R. 707; Toms v. Whitney, 35 Up. Can. Q. B. 195; Miller v. Butler, 6 Cush. 71, 52 Am. Dec. 768; Chapman v. Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

[2] Citing Townshend on Slander & L., § 158; Miller v. Butler, 6 Cush. 71.

[3] Zier v. Hofflin, 33 Minn. 66, 21 N. W. Rep. 862, 53 Am. Rep. 9. This view is approved in Merchants' Ins. Co. v. Buckner, 98 Fed. Rep. 222, 39 C. C. A. 19.

[4] Swan v. Tappan, 5 Cush. 104; Malachy v. Soper, 3 Bing. N. C. 371; Ingram v. Lawson, 6 id. 212; Evans v. Harlow, 5 Q. B. 624.

[5] Id.; Halsey v. Brotherhood, 19 Ch. Div. 386; Burkett v. Griffith, 90 Cal. 532, 27 Pac. Rep. 527, 25 Am. St. 151, 13 L. R. A. 707; May v. Anderson, 14 Ind. App. 251, 42 N. E. Rep. 946; Andrew v. Deshler, 45 N. J. L. 167; Cardon v. McConnell, 120 N. C. 461, 27 S. E. Rep. 109.

[6] Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322; May v. Anderson, 14 Ind. App. 251, 42 N. E. Rep. 946; Linville v. Rhoades, 73 Mo. App. 217; Hopkins v. Drowne, 21 R. I. 20, 41 Atl. Rep. 567.

which govern the action on the case. It lies for all wrongful acts unaccompanied by force from which injury ensues.[1] Slander of title falls within its scope. The publication must be malicious; the language must be false and must occasion, as a natural and proximate consequence, a pecuniary loss — a special damage.[2] The allegation of damages must be special.[3] If the defamation is committed in the execution of a deed all who joined therein are jointly liable for the consequences, and it may be shown that after its execution they, or any of them, asserted title to the premises. Such testimony tends to show the slander and the wilfulness and maliciousness of the claim made in asserting title to the property. If the claim was made with knowledge that it was baseless the person injured may recover, in addition to the taxable costs, any other reasonable outlay made by him in removing the cloud cast upon his title by the recitals in the deed.[4] The jury may award punitive damages.[5] A well-considered English case lays down the rule that in an action for words not actionable *per se*, but constituting an untrue statement concerning the plaintiff's business, and which were maliciously published, which statement is intended or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular known customers, evidence may be given of such general loss of business and it is sufficient to support the action.[6]

[1] Snow v. Judson, 38 Barb. 212; Wren v. Weild, L. R. 4 Q. B. 213; White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527; Gallager v. Brunel, 6 Cow. 346; Wier v. Allen, 51 N. H. 177; Pitt v. Donovan, 1 M. & S. 639; Cousins v. Merrill, 16 Up. Can. C. P. 114; West Counties Manure Co. v. Lower Chemical Manure Co., L. R. 9 Ex. 218.

[2] Townshend on Slander & L., §§ 206–206*c*; Kendall v. Stone, 5 N. Y. 14; Like v. McKinstry, 41 Barb. 186, 4 Keyes, 397; Smith v. Spooner, 3 Taunt. 246; Hill v. Ward, 13 Ala. 310; Bailey v. Dean, 5 Barb. 297; Linden v. Graham, 1 Duer, 670; Paull v. Halferty, 63 Pa. 46, 3 Am. Rep. 518; Re Madison Ave. Baptist Church, 26 How. Pr. 72; Burkett v. Griffith, 90 Cal. 533, 27 Pac. Rep. 527, 25 Am. St. 151, 13 L. R. A. 707.

[3] Ashford v. Choate, 20 Up. Can. C. P. 471; Malachy v. Soper, 3 Bing. N. C. 371; Delegall v. Highley, 8 C. & P. 444; Kendall v. Stone, 5 N. Y. 14; Like v. McKinstry, 41 Barb. 186; Wilson v. Dubois, 35 Minn. 471, 29 N. W. Rep. 68, 59 Am. Rep. 335. See Le Massena v. Storm, 62 App. Div. 150, 70 N. Y. Supp. 882.

[4] Chesebro v. Powers, 78 Mich. 472, 44 N. W. Rep. 290.

[5] Hopkins v. Drowne, 21 R. I. 20, 41 Atl. Rep. 567.

[6] Ratcliffe v. Evans, [1892] 2 Q. B. 524; Landon v. Watkins, 61 Minn. 137, 63 N. W. Rep. 615.

Section 2.

THE DEFENSE.

[675] **§ 1224. Failure of plea of justification.** A plea of justification puts upon record a repetition of the defamatory charge, and includes a deliberate averment of its truth. Where such a plea is made, with no intention to support it by proof, or without reasonable ground for believing that the charge is true and can be proved, it is generally regarded as evidence of malice in the original speaking, as an aggravation of the wrong complained of, which may be considered by the jury for the enhancement of damages.[1] In Fero v. Roscoe[2] Bronson, C. J., said: "When one who is sued for defamation deliberately reaffirms the slander, and puts it on the records of the court by way of justification, if he fails to establish the truth of his plea he has done the plaintiff a new injury, which may properly be regarded as an aggravation of the original wrong. It is said that the attempt to justify may be made in good faith, or in the honest belief that the plaintiff is guilty of the matter laid to his charge. That may be so; but the injury to the plaintiff is not diminished by the mistaken belief of the defendant. And when a man is called into court for charging another with a crime he ought to pause and examine before he repeats the charge and places it on record; and if he makes a mistake in such a matter it should be at his peril, and not at the peril of the injured party."

[676] In New York and some other states pleading and failing to establish a justification has been held conclusive evi-

[1] Henderson v. Fox, 83 Ga. 233, 9 S. E. Rep. 839; Coffin v. Brown, 94 Md. 190, 50 Atl. Rep. 567; Lowe v. Herald Co., 6 Utah, 175; Walker v. Wickens, 49 Kan. 42, 30 Pac. Rep. 181; Jackson v. Stetson, 15 Mass. 48; Alderman v. French, 1 Pick. 1; Lea v. Robertson, 1 Stew. 138; Updegrove v. Zimmerman, 13 Pa. 619; Gorman v. Sutton, 32 id. 247; Gilman v. Lowell, 8 Wend. 573; Shartle v. Hutchinson, 3 Ore. 337; Robinson v. Drummond, 24 Ala. 174; Pool v. Devers, 30 Ala. 672; Beasley v. Meigs, 16 Ill. 139; Spencer v. McMasters, id. 405; Doss v. Jones, 5 How. (Miss.) 158; Wilson v. Nations, 5 Yerg. 211; Faucitt v. Booth, 31 Up. Can. Q. B. 263; Wilson v. Robinson, 14 L. J. (Q. B.) 196; Smith v. Times Co., 4 Pa. Dist. Rep. 399; Tillinghast v. McLeod, 17 R. I. 208, 21 Atl. Rep. 345; Sun Printing & Pub. Ass'n v. Schenck, 98 Fed. Rep. 925, 40 C. C. A. 163. See Caulfield v. Whitworth, 18 L. T. (N. S.) 527.

[2] 4 N. Y. 165.

dence of malice, and to preclude any mitigating effect from the evidence given in support of the plea, as well as to deprive the defendant of other mitigations.[1] In other states [677] such a plea is not necessarily evidence of express malice. If the defendant, having reasonable cause and good grounds to believe the plaintiff guilty on evidence creating a strong presumption of guilt, pleads a justification for the purpose of getting these circumstances in evidence, and not for the purpose of repeating the slander, such plea is not evidence of express malice.[2] If he fails to make good such a plea it is in itself a circumstance which the jury may consider in fixing the damages as an aggravation of the tort;[3] but the jury is not bound in all cases so to consider it. On the contrary, if the defendant shows strong grounds in support of the charge he has made, though he does not wholly support his plea, the jury may, if they see fit, consider these grounds as mitigating [678] circumstances, and reduce the damages accordingly.[4] So it has been held that where the plea of justification was so defectively drawn that judgment could not be rendered upon it,[5]

[1] Id.; Van Benschoten v. Yaple, 13 How. Pr. 97; Shelton v. Simmons, 12 Ala. 466; Root v. King, 7 Cow. 613; Mapes v. Weeks, 4 Wend. 659; Bisbey v. Shaw, 12 N. Y. 72.

It was said in Larned v. Buffinton, 3 Mass. 546, 3 Am. Dec. 185, that "when through the fault of the plaintiff the defendant, as well at the time of the speaking the words as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate the damages."

[2] Parke v. Blackiston, 3 Harr. 373; Thomas v. Fischer, 71 Ill. 576; Ransone v. Christian, 49 Ga. 491; Sloan v. Petrie, 15 Ill. 425; Thomas v. Dunaway, 30 id. 373; Pallet v. Sargent, 36 N. H. 496; Rayner v. Kinney, 14 Ohio St. 283; Huson v. Dale, 19 Mich. 17, 2 Am. Rep. 66; Wilson v. Robinson, 7 Q. B. 68.

In Nebraska evidence of express malice is not admissible to affect the damages, they being confined to such as are compensatory. But if a plea of justification is made, evidence of such malice may be received to disprove the claim that the libel was published in good faith, from proper motives and for justifiable ends. Bee Pub. Co. v. World Pub. Co., 59 Neb. 713, 82 N. W. Rep. 28.

[3] Robinson v. Drummond, 24 Ala. 174; Dewit v. Greenfield, 5 Ohio, 225; Cavanaugh v. Austin, 42 Vt. 576; Wilson v. Nations, 5 Yerg. 211; Burckhalter v. Coward, 16 S. C. 435; Corridan v. Wilkinson, 20 Ont. App. 184.

[4] Ransone v. Christian, 49 Ga. 491; Henderson v. Fox, 83 id. 233, 9 S. E. Rep. 839; Byrket v. Monohon, 7 Blackf 83, 41 Am. Dec. 212; Landis v. Shanklin, 1 Ind. 92; Shank v. Case, id. 170; West v. Walker, 2 Swan, 32; Kennedy v. Holbern, 16 Wis. 457.

[5] Braden v. Walker, 8 Humph. 34.

or was withdrawn before trial,[1] or before a second trial, although an effort had been made to prove its truth on the first trial,[2] it is not to be considered in aggravation of damages. In Illinois it has been held that the withdrawal of the plea on the trial may be considered by the jury on the question of damages.[3] It has been ruled otherwise in Michigan.[4]

§ 1225. Same subject; effect of statutes. Now in New York and in other states, by statute, the plea of justification, put in in good faith, though unsustained by proof, is no longer evidence of malice to be considered by the jury for the enhancement of damages.[5] In Distin v. Rose[6] Church, C. J., said: "The code has made this change in the law as it previously stood, that although the justification is not sustained, yet the facts adduced for that purpose may be used in mitigation of damages if they tend to show good faith or a belief in the truth of the words uttered. But when there is a total failure of proof tending in this direction and the circumstances evince malice in reiterating the slander in the pleadings it is allowable for the jury to take that circumstance into consideration.[7] I see no difference in principle whether the action be for breach of promise or slander. If a defendant in the former case takes advantage of his position as a party to maliciously invent a slander and spread it upon the record, or in the latter to repeat one already invented, it makes no difference. The law will not justify either. This rule should be applied with care and moderation, and I think should be confined to cases of bad faith in incorporating the justification in the pleading, and this can scarcely be said to be true under the code when the facts proved ought legitimately to go in mitigation of damages, because it seems incongruous to say that a failure to establish a

[1] Gilmore v. Borders, 2 How. (Miss.) 824.

[2] Morris v. Lachman, 68 Cal. 109, 8 Pac. Rep. 799.

[3] Beasley v. Meigs, 16 Ill. 139; Spencer v. McMasters, id. 405.

[4] Evening News Ass'n v. Tryon, 42 Mich. 549, 4 N. W. Rep. 267, 36 Am. Rep. 450. See Simpson v. Robinson, 12 Q. B. 513; Warwick v. Foulkes, 12 M. & W. 507; Shirley v. Keathy, 4 Cold. 29.

[5] Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360; § 153.

[6] 69 N. Y. 122.

[7] Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. Rep. 457; Distin v. Rose, 69 N. Y. 122; Marx v. Press Pub. Co., 134 N. Y. 561, 31 N. E. Rep. 918; Holmes v. Jones, 121 N. Y. 461, 24 N. E. Rep. 701; Kansas City Star Co. v. Carlisle, 108 Fed. Rep. 344, 47 C. C. A. 384, 393; Browning v. Powers (Mo.), 38 S. W. Rep. 943, 946.

justification may enhance the damages, and yet the facts proved under it may mitigate them."[1] The rule as stated in Distin v. Rose has been followed in Oregon, the statute there being similar to that of New York.[2]

It is said in a late case that from the cases last referred to and others which might be cited, the rule seems to be well settled that before the jury can award the plaintiff additional damages because the defendant pleaded a justification which he has failed to establish, they must find that the justification was pleaded in bad faith; that in interposing such a defense the defendant was actuated by a wanton desire to further injure the plaintiff, and that unless such fact first be found, then the plea of justification is no evidence of malice, and cannot be considered upon the question of exemplary damages; but if such fact be found, then it may be considered in aggravation of the damages.[3] The failure to sustain the plea of justification need not be ttoal in order that bad faith may be inferred.[4] In Massachusetts it is provided by statute that if the defendant fails to establish the plea of justification it shall not of itself be proof of malice, but the jury sha ll [679] decide the whole case, whether such plea was or was not made with malicious intent.[5] The Michigan statute provides that if the defendant shall give notice in his justification that the words spoken or published were true, such notice, though not maintained by the evidence, shall not in any case be of itself proof of the malice charged in the declaration.[6] This does not bar the jury from considering whether an unsustained notice of justification may not be evidence tending to show malice, when taken in connection with other facts. But before using the fact that such notice was unsustained as evidence of malice they ought to find that there was bad faith in giving the notice.[7]

[1] Doe v. Roe, 32 Hun, 628; Aird v. Fireman's Journal Co., 10 Daly, 254.

[2] Upton v. Hume, 24 Ore. 420, 436, 33 Pac. Rep. 810, 21 L. R. A. 493, 41 Am. St. 863.

[3] Willard v. Press Pub. Co., 52 App. Div. 448, 65 N. Y. Supp. 73. See Potter v. New York Evening Journal Pub. Co., 68 App. Div. 95, 103, 74 N. Y. Supp. 317.

[4] Potter v. New York Evening Journal Pub. Co., 68 App. Div. 95, 74 N. Y. Supp. 317.

[5] St. 1826, ch. 107, § 2; Pub. Stats. 1882, ch. 167, § 79.

[6] 2 Howell's Stats., § 7776.

[7] Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N. W. Rep. 935.

§ 1226. Evidence in mitigation; plaintiff's bad character. The defendant is entitled to offer, under the general issue, evidence of the plaintiff's general bad character at and before the time when the libel or slander was published, although he has also filed a plea of justification.[1] The plaintiff's[2] character is in issue in such actions. It is presumed by law to be good, though it is generally so averred in the complaint or declaration.[3] Such an averment is unnecessary and requires no denial in an answer under the code to let in disparaging proof; nor was it traversable at common law.[4] If denied, the denial will not have the effect of an unsupported plea of justification if no attempt is made to support the denial by proof, so as to aggravate the injury and authorize the jury to add to the amount of damages.[5] Evidence of the plaintiff's bad character is admitted for the reason that a person of disparaged fame or bad character does not suffer the same injury and is not entitled to the same measure of reparation as one whose character is unblemished.[6] The inquiry for this purpose must be confined to general character or reputation.[7] Particular acts

[1] Mahoney v. Belford, 132 Mass. 393; Stone v. Varney, 7 Met. 86, 39 Am. Dec. 762; Henry v. Norwood, 4 Watts, 347; Powers v. Presgroves, 38 Miss. 227; Root v. King, 7 Cow. 613; Pope v. Welsh, 18 Ala. 631; Anonymous, 8 How. Pr. 434; Young v. Bennett, 5 Ill. 43; Burton v. March, 6 Jones, 409; Moyer v. Moyer, 49 Pa. 210; Georgia v. Bond, 114 Mich. 196, 72 N. W. Rep. 232; Sickra v. Small, 87 Me. 493, 33 Atl. Rep. 9, 47 Am. St. 344, citing the text; Wuensch v. Morning Journal Ass'n, 4 App. Div. 110, 38 N. Y. Supp. 605; Candrian v. Miller, 98 Wis. 164, 73 N. W. Rep. 1004. But see Myers v. Curry, 22 Up. Can. Q. B. 470; Smith v. Shumway, 2 Tyler, 74; Jones v. Stevens, 11 Price, 235.

[2] But not that of his family, at least where the plaintiff's reputation is unblemished. Fenstermaker v. Tribune Pub. Co., 12 Utah, 439, 474, 43 Pac. Rep. 112, 35 L. R. A. 611.

[3] Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632.

[4] Ayres v. Covill, 18 Barb. 260; Bennett v. Matthews, 64 Barb. 410; Pink v. Catanich, 51 Cal. 420; Sayre v. Sayre, 25 N. J. L. 235; Parkhurst v. Ketchum, 6 Allen, 406, 83 Am. Dec. 639. See Halley v. Gregg, 82 Iowa, 622, 626, 48 N. W. Rep. 974.

[5] Pink v. Catanich, 51 Cal. 420.

[6] Watson v. Christie, 2 B. & P. 224; Sayre v. Sayre, 25 N. J. L. 235; Ayres v. Covill, 18 Barb. 260; Root v. King, 7 Cow. 634; Hamer v. McFarlin, 4 Denio, 509; Campbell v. Campbell, 54 Wis. 97, 11 N. W. Rep. 456; Stone v. Varney, 7 Met. 86, 39 Am. Dec. 762; Case v. Marks, 20 Conn. 251; Hallowell v. Guntle, 82 Ind. 554; Scott v. Sampson, 8 Q. B. Div. 491; Tracy v. Hacket, 19 Ind. App. 133, 49 N. E. Rep. 185, 65 Am. St. 398; Nellis v. Cramer, 86 Wis. 337, 56 N. W. Rep. 911; Edwards v. Kansas City Times Co., 32 Fed. Rep. 813.

[7] Vick v. Whitfield, Mart. & Hayw. 396; Powers v. Presgroves, 38 Miss. 227; Bell v. Farnsworth, 11 Humph. 608; Pease v. Shippen, 80 Pa. 513, 21

or instances of misconduct cannot be proved;[1] nor ru- [680] mors and reports, unless they are so common and prevalent that they have affected the general character.[2] The admissibility of this evidence is not, as has just been stated, affected by the fact that there is a plea of justification. It should, however, not be allowed to have any effect upon the issue formed upon that plea, but be confined to the question of damages.[3] In some states the inquiry may be as to the plaintiff's general character in respect to the trait involved in the imputation.[4] But such evidence is only admissible if it is shown that the plaintiff had knowledge of such acts when the wrong complained of was done.[5] In other states the inquiry may be

Am. Rep. 116; Dewit v. Greenfield, 5 Ohio, 225; Fisher v. Patterson, 14 Ohio, 418; Parkhurst v. Ketchum, 6 Allen, 406, 83 Am. Dec. 639; McLaughlin v. Cowley, 131 Mass. 70; Shilling v. Carson, 27 Md. 185, 92 Am. Dec. 632; Fuller v. Dean, 31 Ala. 654; Sayre v. Sayre, 25 N. J. L. 235; Clark v. Brown, 116 Mass. 504; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468; Leonard v. Allen, 11 Cush. 241; Buckley v. Knapp, 48 Mo. 152; Hawkins v. Globe Printing Co., 10 Mo. App. 174; Folwell v. Providence Journal Co., 19 R. I. 551, 37 Atl. Rep. 6.

[1] McLaughlin v. Cowley, 131 Mass. 70; Mahoney v. Belford, 132 id. 393; Hallowell v. Guntle, 82 Ind. 554; Scott v. Sampson, 8 Q. B. Div. 491; Buckley v. Knapp, 48 Mo. 152; Wuensch v. Morning Journal Ass'n, 4 App. Div. 110, 38 N. Y. Supp. 605; Duval v. Davey, 32 Ohio St. 604.

[2] Bowen v. Hall, 20 Vt. 232; Inman v. Foster, 8 Wend. 602; Folwell v. Providence Journal Co., 19 R. I. 551, 558, 37 Atl. Rep. 6, quoting the text.

[3] Bowen v. Hall, 20 Vt. 232.

[4] Id.; Warner v. Lockerby, 31 Minn. 421, 18 N. W. Rep. 145, 821; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156; Bell v. Farnsworth, 11 Humph. 608; Dewit v. Greenfield, 5 Ohio, 225; Wright v. Schroeder, 2 Curtis, 548; Bridgman v. Hopkins, 34 Vt. 532; Conroe v. Conroe, 47 Pa. 198; McNutt v. Young, 8 Leigh, 542; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Lambert v. Pharis, 3 Head, 622; Drown v. Allen, 91 Pa. 393; Sickra v. Small, 87 Me. 493, 33 Atl. Rep. 9, 47 Am. St. 344; Finley v. Widner, 112 Mich. 230, 70 N. W. Rep. 433; Brewer v. Chase, 121 Mich. 526, 80 N. W. Rep. 575, 46 L. R. A. 397; Hilbrant v. Simmons, 18 Ohio Ct. Ct. 123; Duval v. Davey, 32 Ohio St. 604, overruling Dewitt v. Greenfield, 5 Ohio, 225; Schulze v. Jalonick, 18 Tex. Civ. App. 296, 44 S. W. Rep. 580.

In Clark v. Brown, 116 Mass. 504, it was held that the defendant might introduce evidence in mitigation that the plaintiff's general reputation was bad or show that his general reputation was bad in respect to the charge made by the alleged slanderous words.

[5] Edwards v. San Jose Printing & Pub. Society, 99 Cal. 431, 439, 34 Pac. Rep. 128, 37 Am. St. 70; Hatfield v. Lasher, 81 N. Y. 246; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 9 L. R. A. 621, 25 N. E. Rep. 161, 20 Am. St. 730; Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528; Palmer v. Matthews, 162 N. Y. 100, 56 N. E. Rep. 501; Gray v. Brooklyn Union Pub.

as to the plaintiff's general reputation without respect to such trait.[1] If the libel includes several charges evidence of the plaintiff's bad character as to any of them is admissible under a general denial.[2] It is not to be denied that there are some cases which favor the admission of evidence, to affect the plaintiff's character, of common rumor and suspicions that he has been guilty of the acts imputed to him in the alleged slanderous words,[3] if the rumor and suspicions had come to the ears of the plaintiff before the libel was published.[4]

[681] **§ 1227. Same subject; evidence of common reports as to plaintiff's guilt.** If only not guilty is pleaded the defendant has been allowed in some jurisdictions to show, solely in mitigation of damages by rebutting in some degree the

Co., 35 App. Div. 286, 55 N. Y. Supp. 35. But compare Schulze v. Jalonick, 18 Tex. Civ. App. 296, 44 S. W. Rep. 580.

[1] Goodbread v. Ledbetter, 1 Dev. & Bat. L. 12; Paddock v. Salisbury, 2 Cow. 811; Andrews v. Vanduzer, 11 Johns. 38; —— v. Moor, 1 M. & S. 284; Leicester v. Walter, 2 Camp. 251; Rodriques v. Tadmire, 2 Esp. 720; Sheahan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Van Benschoten v. Yaple, 13 How. Pr. 97; Stiles v. Comstock, 9 id. 48; Richardson v. Northrup, 56 Barb. 105; 29 Am. Dec. 266, note; Sayre v. Sayre, 25 N. J. L. 239.

In Jones v. Stevenson, 11 Price, 235, the court of exchequer held that in actions for libel general evidence of the plaintiff's bad character was irrelevant and inadmissible either to contradict the averments of good character contained in the declaration or in mitigation of damages. Graham, B., said: "On the present occasion there is a full concurrence of opinion amongst the whole court that such general evidence of bad character, whether offered on the general issue or in proof of matter pleaded by way of justification, is not admissible, and principally on the ground that a party cannot be expected to be prepared to rebut it; and that if it were received, any man might fall a victim to a combination made to ruin his reputation and good name even by means of the very action which he should bring to free himself from the effects of the malicious slander." It is observed of this case in Scott v. Sampson, 8 Q. B. Div. 491, 500, that it was an action for a libel on the plaintiff in the way of his profession as an attorney. Looking at the reasons given by the learned judges, it would almost appear that they regarded the evidence tendered in that case as evidence of particular facts tending to show the plaintiff's disposition. Although this case was decided by a court *in banc* in 1822, it does not appear to have been cited in cases ruled soon after. It has, however, been followed in the case referred to. See § 1227.

[2] Candrian v. Miller, 98 Wis. 164, 73 N. W. Rep. 1004.

[3] Case v. Marks, 20 Conn. 248; Leicester v. Walter, 2 Camp. 251; —— v. Moor, 1 M. & S. 284.

[4] Brewer v. Chase, 121 Mich. 526, 80 N. W. Rep. 575, 46 L. R. A. 397; Wolff v. Smith, 112 Mich. 359, 70 N. W. Rep. 1010.

presumption of malice, that before the alleged speaking of the words it was a common rumor in the neighborhood that the plaintiff had been guilty of the specific offense charged.[1] In Shilling v. Carson[2] the court said that whether the defendant will be permitted under the general issue to give such evidence is not universally agreed. But where the evidence goes to prove that the defendant did not act wantonly and under the influence of actual malice, or it is offered solely to show the real character and degree of malice which the law implied from the falsity of the charge, all intention of proving the truth being disclaimed, it may be admitted and considered by the jury.[3] The admissibility of such evidence is forcibly contended for by Pennington, J., in Cook v. Barkley.[4] The weight of authority it is believed is opposed to its admission either on a plea of justification or in mitigation.[5] In Wilson

[1] Stuart v. News Pub. Co., 67 N. J. L. 317, 51 Atl. Rep. 709; Edgar v. Newall, 24 Up. Can. Q. B. 215; Skinner v. Powers, 1 Wend. 451; Wetherbee v. Marsh, 20 N. H. 561, 51 Am. Dec. 244; Cook v. Barkley, 2 N. J. L. 169, 2 Am. Dec. 343; Hess v. Gansz, 90 Mo. App. 439; Fuller v. Dean, 31 Ala. 654; Calloway v. Middleton, 2 A. K. Marsh. 372, 12 Am. Dec. 409; Van Derveer v. Sutphin, 5 Ohio St. 293; Galloway v. Courtney, 10 Rich. 414; Bridgman v. Hopkins, 34 Vt. 532; Kennedy v. Gregory, 1 Bin. 85; Henson v. Veatch, 1 Blackf. 369; Morris v. Barker, 4 Harr. 520; Fletcher v. Burrows, 10 Iowa, 557; Foot v. Tracy, 1 Johns. 45; Nelson v. Evans, 1 Dev. 9; Hinkle v. Davenport, 38 Iowa, 355; Jones v. Townsend's Adm'x, 21 Fla. 431; Montgomery v. Knox, 23 id. 595, 3 So. Rep. 211; Hewitt v. Pioneer Press Co., 23 Minn. 178, 23 Am. Rep. 680; Saunders v. Mills, 6 Bing. 213; Patten v. Belo, 79 Tex. 41, 14 S. W. Rep. 1037; McIntyre v. Bransford (Ky.), 17 S. W. Rep. 359 (under a statute permitting the defendant to show mitigating circumstances to reduce the damages); Hay v. Reid, 85 Mich. 296, 48 N. W. Rep. 507; Nailor v. Ponder, 1 Marvel, 408, 41 Atl. Rep. 88; Blickenstaff v. Perrin, 27 Ind. 527; Fowler v. Fowler, 113 Mich. 575, 71 N. W. Rep. 1084; Nelson v. Wallace, 48 Mo. App. 194; Hoboken Printing & Pub. Co. v. Kahn, 58 N. J. L. 359, 33 Atl. Rep. 382 (in this case it was held that the defendant might show that the calumnious statement had been received in the way of common gossip; the court of errors divided five to six); Upton v. Hume, 24 Ore. 420, 434, 33 Pac. Rep. 810, 21 L. R. A. 493, 41 Am. St. 863.

In Indiana matters "currently circulated and reported" are not provable; it is otherwise with general rumors and general suspicions as to the plaintiff's guilt of the acts charged. Gray v. Elzroth, 10 Ind. App. 587, 37 N. E. Rep. 551, 53 Am. St. 400.

[2] 27 Md. 175, 92 Am. Dec. 632.

[3] See Lambert v. Pharis, 3 Head, 622.

[4] 2 N. J. L. 169, 2 Am. Dec. 343.

[5] Storey v. Early, 86 Ill. 461; Peterson v. Morgan, 116 Mass. 350; Clark v. Munsell, 6 Met. 373; Alderman v. French, 1 Pick. 1; Wolcott v. Hall, 6

v. Fitch[1] Crockett, J., said: "It has often been decided that it is not admissible to prove in mitigation that prior and up to the time of the publication the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel. Some of the earlier cases hold such proof to be admissible. But the current of modern authorities is to the contrary. These decisions proceed on the theory that public policy, the good order and repose of society and a due regard for the protection of private character demand that no one should be permitted to excuse or palliate the offense of defaming the reputation of another on so slight a ground as public rumor or general suspicion, which are often unfounded and the result of malice or misapprehension. [684] If the defendant had offered to prove in mitigation that the plaintiff was commonly reported and generally believed to have been guilty of the acts imputed to him in the alleged libel, I think the proof would not have been admissible in mitigation of damages under the rule established by the almost unbroken current of modern decisions."[2] Savage, C.

Mass. 514, 4 Am. Dec. 173; Inman v. Foster, 8 Wend. 602; Wilson v. Fitch, 41 Cal. 363; Chamberlin v. Vance, 51 id. 75; Beardsley v. Bridgman, 17 Iowa, 290; Fisher v. Patterson, 14 Ohio, 418; Kenney v. McLaughlin, 5 Gray, 3, 66 Am. Dec. 345; Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cush. 133, 141; Anthony v. Stephens, 1 Mo. 254, 13 Am. Dec. 497; Dame v. Kenney, 25 N. H. 323; Moberly v. Preston, 8 Mo. 466; Scott v. McKinnish, 15 Ala. 664; Pallet v. Sargent, 36 N. H. 496; Bowen v. Hall, 20 Vt. 232; Sheahan v. Collins, 20 Ill. 325, 71 Am. Dec. 271; Mills v. Spencer, 1 Holt, 535, 3 Eng. C. L. 177; Collins v. Stephenson, 8 Gray, 438; Mapes v. Weeks, 4 Wend. 659; Matson v. Buck, 5 Cow. 499; Preston v. Frey, 91 Cal. 107, 27 Pac. Rep. 533; Baldwin v. Boulware, 79 Mo. App. 5; Sun Printing & Pub. Ass'n v. Schenck, 98 Fed. Rep. 925, 40 C. C. A. 163; Tribune Ass'n v. Follwell, 107 Fed. Rep. 646, 46 C. C. A. 526; Cox v. Strickland, 101 Ga. 482, 28 S. E. Rep. 655; Sickra v. Small, 87 Me. 493, 33 Atl. Rep. 9, 47 Am. St. 344.

[1] 41 Cal. 363.

[2] In 13 Am. Dec. 500, the annotator says: "The correct doctrine, it is conceived, is that laid down in Bowen v. Hall, 20 Vt. 232, that reports or suspicions of the plaintiff's guilt are inadmissible unless they have become so general as to affect the reputation or character. Of course, the defendant ought not to be held responsible for damage done to the plaintiff's character by the slander before he (the defendant) took any part in circulating it. But, on the other hand, it is certainly the sounder as well as the safer rule to require every person who assists in giving currency to a defamatory report concerning another to take upon himself the risk of its being false, unless he repeats the report not merely from an honest belief in its truth, but also for justifiable ends. The mere tattler

J., in Gilman v. Lowell,[1] thus forcibly states the objections to such evidence: "That reports of a similar character were prevalent in the neighborhood might show a less degree of malice in the defendant; but they have a tendency to prove the truth and are therefore inadmissible; not that reports are testimony to convict of a crime, but they destroy reputation and have in fact the same effect as proof. It often happens that reports prejudicial to the plaintiff have prevailed extensively before he commences a suit, and the fact that his character is suffering from these reports unmerited opprobrium drives him to a prosecution. If then he is to be met by these reports and only allowed a nominal verdict, which is about equal to a verdict against him, 'he had better,' in the language of Chief Justice Parsons,[2] which I have before quoted in Matson v. Buck,[3] 'sink privately under the weight of unmerited calumny, lest by attempting his vindication he give notoriety to slanders which before had been circulated only in whispers.'"

In a recent case Cave, J., after reviewing the previous cases ruled in the various English courts, says that evidence of rumors and suspicions to the same effect as the defamatory matter complained of is inadmissible on principle, as only indirectly tending to affect the plaintiff's reputation. "If these rumors and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue. To admit evidence of rumors and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading through the means of the publicity attending judicial proceedings what he may have picked upon from the most disreputable sources and what no man of sense, who knows the plaintiff's character, would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for

and scandal-monger should be held to a strict accountability, whether he is the originator of the slander or only aids in its circulation. Every individual who wantonly or negligently contributes to the perpetration of the injury should be responsible for its consequences."

[1] 8 Wend. 579.

[2] 6 Mass. 518, 4 Am. Dec. 173.

[3] 5 Cow. 500.

the plaintiff to meet and rebut such evidence, for all those who know him best can say is that they have not heard anything of these rumors. Moreover, it may be the defendant himself who has started them."[1] In an action for words imputing unchas- [685] tity to a woman it was held no defense to show that the defendant spoke them to her and was led to do so by her general conduct, and especially by her deportment with a particular man, believing the imputation to be true. Evidence of particular instances was held not admissible.[2] Rumors and reports short of general reputation are inadmissible because they are generally held not to afford any extenuation of the wrong of aiding to continue the scandal,[3] and facts which might lead to a suspicion and reasonable belief of the truth of the imputation are excluded under the rule that requires a plea of justification to let in proof tending to show the truth of the words.[4] But under the statutes, now general in this country, allowing facts and circumstances alleged either in justification or in mitigation to be considered in mitigation, where the justification,

[1] Scott v. Sampson, 8 Q. B. Div. 491, 503. Continuing, the judge said: "Turning to the authorities, it will be seen that while such evidence appears to have been admitted by Lord Ellenborough, C. J., in Eamer v. Merle (not reported), and by Cresswell, J., with the approbation of Wightman, J., in Richards v. Richards (2 M. & Rob. 557), and while its admissibility was supported by Pigot, C. B., in Bell v. Parke (11 Ir. C. L. Rep. 413), it was doubted by Abbott, C. J., in Waithman v. Weaver (11 Price, 257, n.), and by Coleridge, J., in Nye v. Thompson (16 Q. B. 175), and it was held inadmissible by Fitzgerald and Hughes, BB., in Bell v. Parke (11 Ir. C. L. Rep. 413), and by the whole court of exchequer in Jones v. Stevens (11 Price, 235). In Leister v. Walter (2 Camp. 251), evidence of rumors and suspicions was admitted by Sir James Mansfield against his own judgment; but in that case it was proposed to prove that the plaintiff's relations and former acquaintances had ceased to visit him on account of these rumors and suspicions, so that the evidence would seem really to have amounted to evidence of general reputation. Upon the whole, both the weight of authority and principle seem against the admission of such evidence."

[2] Parkhurst v. Ketchum, 6 Allen, 406, 83 Am. Dec. 639; McLaughlin v. Cowley, 131 Mass. 70; Fitzgerald v. Stewart, 53 Pa. 343; Dewit v. Greenfield, 5 Ohio, 225; Vick v. Whitfield, 2 Hayw. 222; R—— v. M——, 21 Wis. 50; Watson v. Moore, 2 Cush. 133. See Lawler v. Earle, 5 Allen, 22; Shoulty v. Miller, 1 Ind. 544.

[3] Proctor v. Houghtaling, 37 Mich. 41; Bush v. Prosser, 11 N. Y. 347; Willover v. Hill, 72 id. 36; Sickra v. Small, 87 Me. 493, 33 Atl. Rep. 9, 47 Am. St. 344; Watson v. Moore, 2 Cush. 134; Stepp v. Croft, 18 Pa. Super. Ct. 101.

[4] Brickett v. Davis, 21 Pick. 407, 408

pleaded in good faith, is not established, all such as were known to the defendant at the time of speaking the words, and calculated to induce a belief in their truth, may be proved and considered.[1]

§ **1228. Same subject; proof of truth of words.** To prevent surprise to the plaintiff on the trial it has been usually held since Underwood v. Parks[2] that the defendant shall not introduce evidence of the truth of the imputation unless he has specially pleaded that the words were true by way of justification.[3] In the absence of such a plea evidence tending to establish the truth of the charge is generally held inadmissible for the purpose of mitigation.[4] But the defendant may prove under the general issue the circumstances which induced him erroneously to make the charge. Particular facts which [686] might form links in the chain of circumstantial evidence against the plaintiff cannot be proved. Accordingly, it was held that proof that he was in possession of the property alleged to have been stolen and returned it to the owner about the time of the prosecution of another person for the stealing of other property alleged to have been taken at the same time was held inadmissible on that ground.[6] The defendant may

[1] Bush v. Prosser, 11 N. Y. 347; Hatfield v. Lasher, 81 id. 246; Distin v. Rose, 69 id. 127.

[2] 2 Str. 1200.

[3] § 152; Townshend on Slander & L. 682; Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cush. 133; Root v. King, 7 Cow. 613; Pallet v. Sargent, 36 N. H. 496; Young v. Bennett, 5 Ill. 43; Beardsley v. Bridgman, 17 Iowa, 290; Ridley v. Perry, 16 Me. 21; Minesinger v. Kerr, 9 Pa. 312; Porter v. Botkins, 59 Pa. 484, 11 Am. Dec. 130, note; Fenstermaker v. Tribune Pub. Co., 12 Utah, 439, 461, 43 Pac. Rep. 112, 35 L. R. A. 611.

[4] Id.

[5] Id.; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156; Eagan v. Gault, 1 McMull. 468; Dewit v. Greenfield, 5 Ohio, 225; Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Fero v. Ruscoe, 4 N. Y. 162; Warmouth v. Cramer, 3 Wend. 395, 20 Am. Dec. 706; Van Ankin v. Westfall, 14 Johns. 232; Shepard v. Merrill, 13 id. 475; Matson v. Buck, 5 Cow. 499; Laine v. Wells, 7 Wend. 175; Samuel v. Bond, Litt. Sel. Cas. 158; Shirley v. Keothy, 4 Cold. 29; McCampbell v. Thornburgh, 3 Head, 109; Bourland v. Eidson, 8 Gratt. 27; Thompson v. Bowen, 1 Doug. 321, overruled in Farr v. Rasco, 9 Mich. 353, 80 Am. Dec. 88; Parke v. Blackiston, 3 Harr. 373; Bisbey v. Shaw, 12 N. Y. 67; Hutchinson v. Wheeler, 35 Vt. 330; Haywood v. Foster, 16 Ohio, 88; Wilson v. Apple, 3 id. 270; Hawkins v. Globe Printing Co., 10 Mo. App. 174; Warner v. Lockerby, 31 Minn. 421, 18 N. W. Rep. 145, 821; Folwell v. Providence Journal Co., 19 R. I. 551, 37 Atl. Rep. 6; Edwards v. Kansas City Times Co., 32 Fed. Rep. 813.

[6] Warmouth v. Cramer, 3 Wend. 395, 20 Am. Dec. 706.

prove any facts in the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, tending to excuse the uttering of the words, provided the facts do not tend to prove the truth of the charge, but in fact relieve the plaintiff from the imputation.[1] Thus, when a party charged one against whom a justice's judgment had been obtained with false swearing in making oath that he was a freeholder he was allowed to show that, on search for the deed in the proper office where by law it was required to be recorded, it was not found owing to a mistake of the recording officer in indexing the records.[2] A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge; it is unnecessary to repeat and justify every word of the alleged defamatory matter if the substance of the charge be justified. If the substantial imputations be proved true a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would.[3] If, however, the alleged libelous article is indivisible and the facts asserted are dependent on each other to impute the defamatory charge, then each material allegation must be justified or the plaintiff will be entitled to recover to the extent that he has been damaged by the unjustified portion.[4] If a material part of the plea fails the whole of it is bad.[5]

[1] Bourland v. Eidson, 8 Gratt. 27; Purple v. Horton, 13 Wend. 9, 27 Am. Dec. 167; Mosier v. Stoll, 119 Ind. 244, 20 N. E. Rep. 752.

[2] Gilman v. Lowell, 8 Wend. 573; Chestwood v. Mayo, 5 Munf. 16.

In Hutchinson v. Wheeler, 35 Vt. 330, under the general issue, it was held competent for the defendant to show in mitigation, as tending to evince his belief in the words charged, — which were that the plaintiff had poisoned his cow,— that his cow had been poisoned; that for some time previous to the loss there had been a bitter, hostile feeling on the part of the plaintiff towards the defendant; that the defendant having poisoned the plaintiff's dog, the plaintiff had several

[3] Odgers on Libel, etc., 170, citing Alexander v. Railway Co., 34 L. J. (Q. B.) 152; Stockdale v. Tarte, 4 Ad. & E. 1016; Blake v. Stevens, 4 F. & F. 239. To the same effect are Sullings v. Shakespeare, 46 Mich. 413, 9 N. W. Rep. 451, 41 Am. Rep. 166; Hearne v. De Young, 119 Cal. 670, 674, 52 Pac. Rep. 150, quoting the text.

[4] Weaver v. Lloyd, 1 C. & P. 295; Ingram v. Lawson, 5 Bing. N. C. 218; Holmes v. Jones, 147 N. Y. 59, 41 N. E. Rep. 409, 49 Am. St. 646.

[5] Cox v. Strickland, 101 Ga. 482, 493, 28 S. E. Rep. 655.

§ 1229. Same subject. In estimating the damages the degree of the defendant's malice is always to be considered; [687] therefore, any circumstances, consistent with an admission of the falsity of the words spoken, tending to show that he uttered them under a mistaken belief that they were true may be proved under the general issue in mitigation.[1] In the nature of things the scope of this evidence is very limited, and the manifest hardship of compelling a defendant to plead justification, with the hazard of aggravating the damage if it be not established, or of depriving him of the privilege of proving a state of facts which, though tending to prove the words true, and, therefore, of an extenuating nature, were insufficient for that purpose have led to some diversities of decision. Some courts have applied the rule with more liberality than others. In Bush v. Prosser[2] Selden, J., said: "The courts in England, under a sense of the admitted right [of the defendant to mitigate damages by showing the absence of malice], have in a number of cases decided that facts and circumstances falling short of proving, although tending to prove, the truth of the charge might be received in mitigation.[3] But the courts in this state and in Massachusetts, with less justice but better logic, have uniformly held that a rule which excluded proof of the truth of the charge must necessarily exclude evidence tending to prove it. But it is a little surprising to observe how often judges have asserted in the same paragraph both the right to mitigate by disproving malice and the rule which effectually precluded the exercise of the right without any apparent consciousness of the conflict between the two. I will refer to a few only out of the many instances. In the case of King v. Root[4] Judge Savage says that the defendant 'may show in evidence under the general issue, by way of excuse, anything short of a justification which does not necessarily imply the truth of the charge or tend to prove it true,

times threatened to pay the defendant in his own coin; that the defendant had attempted to instigate a prosecution against the plaintiff, and that shortly before the defendant's cow was poisoned a new quarrel had broken out between the parties.

[1] Mosier v. Stoll, 119 Ind. 244, 20 N. E. Rep. 752; Wilson v. Apple, 3 Ohio, 270.

[2] 11 N. Y. 347.

[3] Knobell v. Fuller, Norris' Peake, Append. 130; Chalmers v. Shackell, 6 C. & P. 475; Leicester v. Walter, 2 Camp. 251.

[4] 7 Cow. 613.

but which repels the presumption of malice arising from the fact of publication.' The same judge, in Purple v. Horton,[1] says: 'Facts and circumstances may be shown in mitigation [688] when they disprove malice, and do not tend to prove the charge or form a link in the chain of evidence to prove a justification.' Again, Judge Bronson in Cooper v. Barber[2] says: 'Facts and circumstances which tend to disprove malice by showing that the defendant, though mistaken, believed the charge true when it was made may be given in evidence in mitigation of damages.' It does not appear to have occurred to either of these eminent judges that there was any incongruity between the two branches of the proposition thus asserted by them. But it is certainly difficult to comprehend how a defendant is to disprove malice by showing 'that he believed the charge true when it was made' without giving evidence tending to establish its truth, since a belief based on information derived from others cannot be shown." In Michigan the doctrine of this narrow privilege of mitigation has been rejected; there facts tending to establish the truth of the words may be shown; the plea of the general issue, without notice of justification, is treated as a conclusive admission of their falsity, and that such facts merely disprove malice by showing that the defendant at the time he uttered the words mistakenly believed them to be true.[3] A rule nearly as liberal is recognized in Ohio.[4]

§ 1230. Same subject; effect of statutes. It is very generally provided by statute, and especially in states which have adopted the code, that the defendant may in his plea or answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances. Under such statutes matters in mitigation may and probably should be specially stated in the answer; this is implied by their permissive language.[5] For this purpose facts and circumstances

[1] 13 Wend. 9, 27 Am. Dec. 167.

[2] 24 Wend. 105.

[3] Huson v. Dale, 19 Mich. 17, 2 Am. Rep. 66.

[4] Haywood v. Foster, 16 Ohio, 88; Dewit v. Greenfield, 5 id. 225; Wilson v. Apple, 3 id. 270; Reynolds v. Tucker, 6 Ohio St. 516, 67 Am. Dec. 353.

[5] McKyring v. Bull, 16 N. Y. 297;

may be set up which tend to prove the truth of the charge to show an absence of malice, by proper averments that [689] the defendant was, by such facts, induced to believe the defamatory matter to be true at the time of the publication.[1] The defendant may in his answer allege the truth of the matters charged and mitigating circumstances, or either. It is not necessary to plead the former in order to aver and have the benefit of the latter. All matters receivable in evidence in mitigation may be pleaded for that purpose either with or without justification.[2] Although the evidence fails to prove the justification when the truth of the words is pleaded both for that purpose and in mitigation, he is still entitled to have such evidence as has been adduced tending to establish the truth considered by the jury for the purpose of mitigation.[3] In the absence of any evidence to support the facts pleaded in mitigation, if they were alleged maliciously and without probable cause, the jury may consider the imputations in aggravation of the damages.[4]

§ 1231. Evidence in mitigation generally. The defendant is always entitled to show, under proper pleading, the particular circumstances under which the alleged defamatory matter was published, for the purpose of showing the nature and charac-

§ 166; Willover v. Hill, 72 N. Y. 36, 38; Spooner v. Keeler, 51 id. 527; Bower v. Derideker, 37 Iowa, 418; Fenstermaker v. Tribune Pub. Co., 12 Utah, 439, 464, 43 Pac. Rep. 112, 13 Utah, 532, 45 Pac. Rep. 1097, 35 L. R. A. 611; Mielenz v. Quasdorf, 68 Iowa, 726, 28 N. W. Rep. 41. It is optional in Indiana. O'Connor v. O'Connor, 27 Ind. 69.

[1] Bennett v. Matthews, 64 Barb. 410; Bush v. Prosser, 11 N. Y. 347; McKyring v. Bull, 16 id. 297; Stiles v. Comstock, 9 How. Pr. 48; Heaton v. Wright, 10 id. 79; Bisbey v. Shaw, 12 N. Y. 67; Dolevin v. Wilder, 7 Robert. 319; Van Benschoten v. Yaple, 13 How. Pr. 97; Wachter v. Quenzer, 29 N. Y. 547; Willover v. Hill, 72 id. 36; Adamson v. Raymer, 94 Wis. 242, 68 N. W. Rep. 1000.

[2] Id.; Graham v. Stone, 6 How. Pr. 15; Brown v. Orvis, id. 376; Follett v. Jewett, 1 Am. L. Reg. 600, 11 N. Y. Leg. Obs. 193.

Under a statute allowing under the plea of general issue the introduction, in defense, of "matter of law or fact whatever," evidence of the truth of the alleged defamatory matter is admissible under such a plea though justification be not pleaded. Gomez v. Hawaiian Gazette Co., 10 Hawaiia, 108.

[3] Bisbey v. Shaw, 12 N. Y. 67; Spooner v. Keeler, 51 id. 529; Kinyon v. Palmer, 18 Iowa, 377; Kennedy v. Holborn, 16 Wis. 457; Distin v. Rose, 69 N. Y. 127; Sharpe v. Larson, 74 Minn. 323, 77 N. W. Rep. 233.

[4] Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. Rep. 457; Sun Printing & Pub. Ass'n v. Schenck, 98 Fed. Rep. 925, 40 C. C. A. 163.

ter of the publication[1] as well as the occasion and motive of it.[2] Evidence for this purpose to disprove malice, by showing facts and circumstances which caused the defendant to believe the charge true when he made it, must be such as would reasonably induce in the mind of a person of ordinary intelligence a belief in the truth of the charge, and it must also appear that he was thereby brought to believe in its truth.[3] Therefore, it should appear that at the time the defendant made the charge he knew the facts upon which he relies for mitigation, and he [690] should aver that such facts induced a belief in its truth at the time he made it; or they should be of such a character as to raise a reasonable presumption of such belief.[4] Merely believing the charge to be true, however sincere the belief may be, will not excuse either slander or libel;[5] but a belief

[1] Jeffras v. McKillop, 2 Hun, 351. See Storey v. Early, 86 Ill. 461.

[2] Morris v. Lachman, 68 Cal. 109, 8 Pac. Rep. 799; Jones v. Murray, 167 Mo. 25, 66 S. W. Rep. 981; Collis v. Press Pub. Co., 68 App. Div. 38, 74 N. Y. Supp. 78; Welker v. Butler, 15 Ill. App. 209; Bruce v. Reed, 104 Pa. 408; Larned v. Buffinton, 3 Mass. 546, 3 Am. Dec. 185; Abrams v. Smith, 8 Blackf. 95; Root v. King, 7 Cow. 613; Lewis v. Walter, 4 B. & Ald. 605; Haynes v. Leland, 29 Me. 233; Haines v. Welling, 7 Ohio, 253; Blocker v. Schoff, 83 Iowa, 265, 48 N. W. Rep. 1079; Evening Post Co. v. Hunter, 18 Ky. L. Rep. 726, 38 S. W. Rep. 487; Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 So. Rep. 970; Davis v. Marxhausen, 103 Mich. 315, 61 N. W. Rep. 504; Callahan v. Ingram, 122 Mo. 355, 26 S. W. Rep. 1020, 43 Am. St. 583; Henn v. Horn, 56 Ohio St. 442, 448, 47 N. E. Rep. 248; Adamson v. Raymer, 94 Wis. 243, 68 N. W. Rep. 1000; Beaton v. Intelligencer Printing & Pub. Co., 22 Ont. App. 97.

[3] Dolevin v. Wilder, 7 Robert. 319, 34 How. Pr. 488.

[4] Id.; Hatfield v. Lasher, 81 N. Y. 246; Reynolds v. Tucker, 6 Ohio St. 516, 67 Am. Dec. 353; Whitney v. Janesville Gazette, 5 Biss. 330; Swift v. Dickerman, 31 Conn. 285; Bush v. Prosser, 11 N. Y. 347; Willover v. Hill, 72 id. 36; Morey v. Morning Journal Ass'n, 123 id. 207, 25 N. E. Rep. 161, 9 L. R. A. 621, 20 Am. St. 730; Larrabee v. Minnesota Tribune Co., 36 Minn. 141, 30 N. W. Rep. 462; Pratt v. Pioneer Press Co., 35 Minn. 251, 28 N. W. Rep. 708; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715; Bronson v. Bruce, 59 Mich. 467, 26 N. W. Rep. 671, 60 Am. Rep. 307; Kinney v. Roberts, 26 Hun, 166; Wolff v. Smith, 112 Mich. 359, 70 N. W. Rep. 1010; Lewis v. Humphries, 64 Mo. App. 466; Fenstermaker v. Tribune Pub. Co., 12 Utah, 439, 465, 43 Pac. Rep. 112, 35 L. R. A. 611; Peterson v. Morgan, 116 Mass. 350; Marker v. Dunn, 68 Iowa, 720, 28 N. W. Rep. 38; Huffer v. Miller, 74 Md. 454, 22 Atl. Rep. 205; Sun Printing & Pub. Ass'n v. Schenck, 98 Fed. Rep. 925, 40 C. C. A. 163; Hulbert v. New Nonpareil Co., 111 Iowa, 490, 87 N. W. Rep. 928.

The belief of the person who gave the defendant his information in its truth is not available in mitigation. Hawkins v. Globe Printing Co., 10 Mo. App. 174.

[5] Sans v. Joerris, 14 Wis. 663; Burt

reasonably induced by facts which the law permits to be proved as likely to produce it will mitigate the damages. If specific charges have been made and these were coupled with general charges, it is not permissible to plead in mitigation other and different charges, based upon information received from others.[1]

There is considerable contrariety of decision as to the facts which may be shown in mitigation for having a tendency to create an honest belief of the truth of the imputation. The matter relied upon must be such as by the well-established principles of law may be proved for mitigation.[2] The defendant may show that he was drunk when he uttered the words, as such proof may tend to rebut malice.[3] But where it appeared that he repeated the charge both when drunk and when sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.[4] He may show he was insane;[5] that the publication was confidential.[6] Evidence that the defendant was in the habit of talking much about persons and things and that

v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. Rep. 1, 13 L. R. A. 97; Blocker v. Schoff, 83 Iowa, 265, 48 N. W. Rep. 1079; Austin v. Hyndman, 119 Mich. 615, 78 N. W. Rep. 663; Brewer v. Chase, 121 Mich. 526, 80 N. W. Rep. 575, 46 L. R. A. 397; Holmes v. Jones, 147 N. Y. 59, 41 N. E. Rep. 409, 49 Am. St. 646.

[1] Hess v. New York Press Co., 26 App. Div. 73, 49 N. Y. Supp. 894.

[2] Graham v. Stone, 6 How. Pr. 15.

Where incompetency was charged against an attorney the defendant sought to set up in mitigation an impending election of village trustees; that the plaintiff had been an officer of the village and during his incumbency great extravagance had prevailed; judgments had been obtained against the village while the plaintiff was its attorney; that the charge was but part of a circular distributed to the taxpayers arraigning the plaintiff and other officials and criticising the general conduct of affairs, published for the purpose of arousing public attention to these matters, and that the defendant was a resident taxpayer of the village. These facts did not tend to disprove malice by showing that the words were spoken in the honest belief of their truth, or that there was the least reason for such belief; they had no natural tendency to induce belief that the plaintiff was incompetent or that the defendant had reasonable foundation for that belief arising from those facts, or even that he had such belief at all. Mattice v. Wilcox, 147 N. Y. 624, 634, 42 N. E. Rep. 270; Adamson v. Raymer, 94 Wis. 243, 248, 68 N. W. Rep. 1000.

[3] Howell v. Howell, 10 Ired. 84. *Contra*, Mix v. McCoy, 22 Mo. App. 488.

[4] Id.

[5] Yeates v. Reed, 4 Blackf. 463, 32 Am. Dec. 43.

[6] Jeffras v. McKillop, 2 Hun, 351.

what he said was not regarded by the community as worthy of notice and seldom occasioned remark is not admissible in mitigation.[1] Where by statute the imputation of a want of chastity against a female is made actionable *per se* the repetition of it is not wholly excused by a protest at the time of disbelief, or by showing that those who heard the slander did not believe it to be true. Such conduct is actionable, and the question of the extent of responsibility is one for the jury and is not to be solved by a presumption of harmlessness.[2] Where a female was charged with unchastity in connection with the man she subsequently married it was competent to prove allegations in the answer to the effect that he had been divorced from his wife and that the plaintiff had obtained a divorce from her former husband, and that both actions for divorce were fraudulent and collusive, which facts were known to the defendant prior to the publication of the article complained of.[3] An imputation of perjury in a certain bill in chancery cannot be extenuated by proof that at the time of the publication the defendant supposed and believed that the plaintiff had sworn to it, when in fact it had been sworn to by another [691] person.[4] A retraction of the slander made so promptly as to become a part of the *res gestæ* and freed from all suspicion that it was made by the defendant more for his own protection than for reparation to the victim of his calumny is provable in mitigation.[5] A retraction to be available for this purpose should contain a full and unqualified withdrawal of the charge, unaccompanied with other offensive or libelous matter, and thus evince the intention of making some atonement for the injury done. Allowing such evidence properly gives the defendant a *locus penitentiæ*, and he should have the benefit of it when he evinces an honest endeavor to make atonement to as great an extent as is within his power. But hesitation, lurking insinuation, an attempted perversion of the

[1] Howe v. Perry, 15 Pick. 506.

[2] Burt v. McBain, 29 Mich. 260; Markham v. Russell, 12 Allen, 573, 90 Am. Dec. 169.

[3] Morse v. Press Pub. Co., 63 App. Div. 61, 71 N. Y. Supp. 348.

[4] Owen v. McKean, 14 Ill. 459.

[5] Id.; Taylor v. Hearst, 107 Cal. 262, 40 Pac. Rep. 392; Turner v. Hearst, 115 Cal. 394, 402, 47 Pac. Rep. 129; Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 So. Rep. 970; Storey v. Wallace, 60 Ill. 51; Davis v. Marxhausen, 103 Mich. 315, 61 N. W. Rep. 504; Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. Rep. 1009.

plain import of the language used in the libelous article, or the substitution of one calumny for another, only aggravates the original offense and shows a consciousness of the wrong done without the manliness or magnanimity to repair it.[1] A retraction of a libelous article published after a suit has been brought for the libel, it is held in Michigan, cannot be considered in mitigation;[2] but the weight of authority and the better reasons are in opposition.[3] An offer made by the publisher of a newspaper, pending a suit against him for libel, to publish any explanation or statement the plaintiff wished to make, is of no avail.[4] It is an aggravation, rather than a mitigation, of damages that the libelous matter was published as an advertisement for pecuniary compensation.[5] A person cannot shield himself from liability for full damages for a libelous publication in a newspaper owned or conducted by him by absenting himself when the publication is made, or by establishing rules for the governance of his employees unless such rules be enforced.[6]

Under a statute making good faith on the part of the publisher of a libelous article and the publication of a full and fair retraction a defense against all damages except actual damages, the burden is upon the publisher to establish such defense. The question of good faith and whether the falsity of the article was due to mistake of the facts is for the jury, unless the evidence to establish the defense is undisputed. To constitute "good faith" within the meaning of the statute the publication must have been honestly made in the belief of its truth, and upon reasonable grounds for the belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances.[7]

[1] Hotchkiss v. Oliphant, 2 Hill, 510.

[2] Evening News Ass'n v. Tryon, 42 Mich. 549, 4 N. W. Rep. 267, 36 Am. Rep. 450. See Shirley v. Keathy, 4 Cold. 29.

[3] Turner v. Hearst, 115 Cal. 394, 402, 47 Pac. Rep. 129; Smith v. Harrison, 1 F. & F. 565; Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. Rep. 1009.

[4] Constitution Pub. Co. v. Way, 94 Ga. 120, 21 S. E. Rep. 139; Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. Rep. 1009.

[5] Cox v. Strickland, 101 Ga. 482, 28 S. E. Rep. 655.

[6] Morgan v. Bennett, 44 App. Div. 323, 60 N. Y. Supp. 619; Bennett v. Salisbury, 78 Fed. Rep. 769, 24 C. C. A. 329.

[7] Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. Rep. 936, 12 Am. St. 707, 3 L. R. A. 532.

Whether the retraction is full and fair is a question of law. In order to be so it must clearly refer to and admit the publication of the article complained of, and directly, fully and fairly, without any uncertainty, evasion or subterfuge, retract the alleged false and defamatory statements therein.[1]

§ 1232. Same subject. The defendant may show for the purpose of rebutting malice and reducing damages that the words spoken were in anger, if the anger was induced by plaintiff immediately before the publication[2] or under mental distress growing out of the plaintiff's conduct at the time the alleged wrong was done.[3] Evidence of a previous publication by the plaintiff will not be received in mitigation on the ground of provocation unless not only the connection between the publications be manifest, but also that the provocation is so recent as to induce a fair presumption that the injury complained of was inflicted during the continuance of the feelings and passion excited by the provocation.[4] A distinct and inde-

[1] Gray v. Times Newspaper Co., 74 Minn. 452, 77 N. W. Rep. 204, 73 Am. St. 363; Gray v. Minnesota Tribune Co., 81 Minn. 333, 84 N. W. Rep. 113.

[2] Zurawski v. Reichmann, 116 Iowa, 388, 90 N. W. Rep. 69; Newman v. Stein, 75 Mich. 402, 42 N. W. Rep. 956, 13 Am. St. 447; Ritchie v. Stenius, 73 Mich. 563, 41 N. W. Rep. 687; Robinson v. Keyser, 22 N. H. 323; Pierson v. Steortz, Morris, 136; Warner v. Lockerby, 31 Minn. 421, 18 N. W. Rep. 145, 821; Jauch v. Jauch, 50 Ind. 135. See Haws v. Stanford, 1 Tenn. Cas. 80, Thompson's Cas. 137.

It has been held in Louisiana that the interchange of opprobrious epithets and mutual vituperation and abuse will justify a judge in approving a verdict for the defendant although the slanderous words were proved, and that a verdict so rendered will not be disturbed on appeal. Fulda v. Caldwell, 9 La. Ann. 358; Goldberg v. Dobbertine, 46 La. Ann. 1303, 1308, 16 So. Rep. 192, 28 L. R. A. 721. This rule is said to be exceptional. Brewer v. Chase, 121 Mich. 526, 538, 80 N. W. Rep. 575, 46 L. R. A. 397.

[3] McDougald v. Coward, 95 N. C. 368.

[4] Maynard v. Beardsley, 7 Wend. 560, 22 Am. Dec. 595; May v. Brown, 3 B. & C. 113; Goodbread v. Ledbetter, 1 Dev. & Bat. 12; Child v. Homer, 13 Pick. 503.

There can be no set-off of one libel against another; but in estimating the damages the jury may fairly consider the conduct of the plaintiff and the degree of respect which he himself has shown for the feelings of others. Folkard's Starkie on Slander, § 722; per Blackburn, J., in Kelly v. Sherlock, L. R. 1 Q. B. 698; Seely v. Cole, Wright (Ohio), 681.

It is observed of the remark quoted from Blackburn, J., that if it was to be regarded as law it might on a trial for libel involve this strange condition: the defendant in the action might, as showing the plaintiff's conduct and the degree of respect he had for the feelings of others, set up that he had libeled

pendent libel published by the defendant is not a miti- [692] gation; but, as just stated, if the publication by the plaintiff was so recent as to afford a reasonable presumption that the libel by the defendant was published under the influence of the passions excited by it, or where it is explanatory of the meaning of or of the occasion of writing the libel complained of, it may be given in evidence for that purpose. To render such evidence admissible, however, it is necessary that the article complained of should on its face refer, and profess to be a reply, to the libel published by the plaintiff and that such appear to be its nature and purpose on a comparison of the publications.[1] The libels themselves ought to be strictly proven

A., B., C., and D., and if he did the plaintiff could both justify and reply as to each of the parties that he (the plaintiff) had been first attacked and he had merely rebutted the charges made by each of the persons named. There would thus be involved the trial of four actions before the jury could be satisfied that the plaintiff had improperly attacked the characters and reputations of those others. The law never was in that condition. Downey v. Stirton, 1 Ont. L. R. 186.

There can be no counter-claim in an action for defamation. Fellerman v. Dolan, 7 Abb. Pr. 395, note; Richardson v. Northrup, 56 Barb. 105. See MacDougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

Upon the cross-examination of the defendant certain subsequent articles in his newspaper were introduced upon the question of malice; these were written and their publication paid for by C. The defendant offered to show that enmity existed between the plaintiff and C., and that the plaintiff had published libels concerning C. which provoked these articles. Such testimony was not admissible because such enmity was not known to the defendant, and C. had not instigated the libel in suit. Norton v. Livingston, 64 Vt. 473, 24 Atl. Rep. 247.

[1] Knott v. Burwell, 96 N. C. 272, 2 S. E. Rep. 588; Child v. Homer, 13 Pick. 503; Gould v. Weed, 12 Wend. 12; May v. Brown, 3 B. & C. 113; Stirton v. Gummer, 31 Ont. 236; Downey v. Stirton, 1 Ont. L. R. 186, 190. See Underhill v. Taylor, 2 Barb. 348; Hotchkiss v. Lathrop, 1 Johns. 286; Bourland v. Eidson, 8 Gratt. 27; Brewer v. Chase, 121 Mich. 526, 80 N. W. Rep. 575, 46 L. R. A. 397.

In Richardson v. Northrup, 56 Barb. 105, it was held that the defendant should be allowed to prove any circumstances which, at the time the words charged were spoken, were calculated to irritate and excite the defendant, and provoke him to the utterance of the words complained of; but that it was no answer to the plaintiff's claim of damages for slander that he has said or done anything, whether actionable or not, for the purpose of reducing the damages, unless such act or declaration actually excited the defendant to use the words charged. The defendant, it was also held, might prove a series of provocations on the part of the plaintiff, commencing long anterior to the speaking of the words charged, provided they were

and identified as the cause,[1] and that the plaintiff's publication came to the defendant's knowledge before he published the libel complained of.[2] The jury is to determine whether the language employed by the defendant was used because of [693] the plaintiff's abuse, and they may consider for this purpose the declarations of the defendant.[3] Where the defamatory publication is shown to have resulted immediately from a provocation given by the plaintiff in a defamatory charge against the defendant, only nominal damages in general should be given.[4] If the words complained of were spoken in the presence of the plaintiff his reply may be proved by the defendant.[5] But a subsequent publication cannot be given in evidence to determine whether a publication is libelous or not.[6] If the evidence shows that the defamatory words were spoken immediately after the trial of a law suit between the parties and that they were occasioned by it, it will be competent for the defendant to show the facts and circumstances occurring on, and the conduct of the parties during, the trial; and if the words were spoken in the heat of passion thus excited that will go in mitigation.[7] The defendant may mitigate damages by showing the plaintiff to be a common libeler; but it must be shown in the same way as general reputation is proved; publications of the plaintiff cannot be resorted to for that purpose.[8] If the plaintiff was referred to by an erroneous name the mistake as to the name may be considered upon the

continued from time to time down to and at the time the actionable words were spoken. In such a case each successive repetition of the provocation must necessarily become more annoying and exciting; and though there be no motive or spirit of revenge on the part of the defendant, the excitement of such repetition of the provocation becomes more intense and unbearable, and presents a much stronger case of mitigation than when the actionable words are spoken upon the first provocation. Sheffill v. Van Deusen, 15 Gray, 485, 77 Am. Dec. 377; Porter v. Henderson, 11 Mich. 20, 82 Am. Dec. 59; Lister v. Wright, 2 Hill, 320.

[1] Tarpley v. Blabey, 2 Bing. N. C. 437.

[2] Watts v. Fraser, 7 Ad. & E. 223.

[3] Botelar v. Bell, 1 Mo. 173.

[4] Pugh v. McCarty, 40 Ga. 444; Davis v. Griffith, 4 Gill & J. 342. See Hackett v. Brown, 2 Heisk. 264; Ransone v. Christian, 56 Ga. 351, and note on p. 3552.

[5] Bradley v. Gardner, 10 Cal. 371.

[6] Usher v. Severance, 20 Me. 9, 37 Am. Dec. 33; Downey v. Stirton, 1 Ont. L. R. 186; Downey v. Armstrong, id. 237.

[7] Powers v. Presgroves, 38 Miss. 227.

[8] Maynard v. Beardsley, 7 Wend. 560, 22 Am. Dec. 595.

question of publicity and the amount of the damages.[1] The motive which prompted the plaintiff to bring the action does not affect the amount of the recovery.[2]

§ 1233. Same subject. It is competent for the defendant under the general issue to show that the charge was occasioned by the misconduct of the plaintiff, either in attempting to commit the alleged crime, or in leading the defendant to believe him guilty.[3] But acts and declarations of third persons are inadmissible to show provocation.[4] Facts in the conduct of the plaintiff calculated to create a belief that the charge is true are doubtless provable in mitigation where under the pleadings the defendant is allowed to give evidence tending to show for this purpose that it is true.[5] Evidence of the moral or intellectual character of a person in whose [694] hearing or to whose understanding the slanderous words were spoken is immaterial on the question of damages.[6] In an action against husband and wife for words spoken by her, proof is not admissible in mitigation that the husband endeavored to prevent the circulation of the slander.[7] It has been held that the wrong of a publication of rumors in a newspaper may be mitigated by proof that such rumors existed,[8] and that a defendant may show that he copied the statement complained of as libelous from another newspaper.[9] But in another case it was held that the defendant should not be permitted to show that the charge was copied from another newspaper from the proprietor of which damages had been recovered, though the defendant might prove that he had stricken out many parts of the article which reflected on the plaintiff.[10] The fact that the article complained of was copied

[1] Pellardis v. Journal Printing Co., 99 Wis. 156, 74 N. W. Rep. 99.

[2] Manget v. O'Neill, 51 Mo. App. 35.

[3] West v. Walker, 2 Swan, 32. See Edgar v. Newell, 24 Up. Can. Q. B. 215; McCampbell v. Thornburg, 3 Head, 109.

[4] Underhill v. Taylor, 2 Barb. 348.

[5] Reynolds v. Tucker, 6 Ohio St. 516, 67 Am. Dec. 353; Hatfield v. Lasher, 81 N. Y. 246.

[6] Sheffill v. Van Deusen, 15 Gray, 485, 77 Am. Dec. 377.

[7] Yeates v. Reed, 4 Blackf. 463, 32 Am. Dec. 43.

[8] Skinner v. Powers, 1 Wend. 451; Huron v. Dale, 19 Mich. 17, 2 Am. Rep. 66.

[9] Saunders v. Mills, 6 Bing. 213.

[10] Creevy v. Carr, 7 C. & P. 64; Hoey v. Fletcher, 39 Fla. 325, 22 So. Rep. 716; Hewitt v. Pioneer Press Co., 23 Minn. 178, 23 Am. Rep. 680; Fenstermaker v. Tribune Pub. Co., 13 Utah, 532, 35 L. R. A. 611, 45 Pac. Rep. 1097 (though the article did not state the

from and credited to another newspaper than that published by the defendant does not necessarily mitigate the damages. The effect to be given to a publication so made depends upon the circumstances of the case.[1] It may be shown that the publication complained of professes on its face to be based on other publications which are referred to, as on reports of investigations made concerning the character of a public officer.[2] Wallace, C. J., of the circuit court of appeals, second circuit,[3] has recently announced that "evidence of previous publications by others of the libelous matters charged by the defendant [plaintiff] is, upon principle, clearly inadmissible in reduction, or, standing alone, in mitigation, of damages; and it was so held in Tucker v. Lawson,[4] and Gray v. Publishing Co.[5] It is inadmissible even when coupled with evidence that on such former occasion the plaintiff did not sue the publisher, or take any steps to contradict the charges against him."[6]

In actions for libel the defendant is entitled to read the entire article in which is contained the alleged libel.[7] But distinct or separate libels not declared on cannot be introduced in evidence and relied on either by the plaintiff or defendant to show malice and aggravate or to mitigate damages.[8] When exemplary damages are sought for libel the defendant may prove, in Michigan, any circumstances tending to show that he acted in good faith and with all proper precautions, and had good cause to believe that the statement complained of was true.[9] Where it appears that the libel was published with no intent to injure the person libeled and that all proper precautions were observed in publishing it, the recovery of damages

sources of the defendant's information, citing Wilson v. Fitch, 41 Cal. 363; Newell on Defamation, p. 884, n. 18, p. 895; Henkle v. Davenport, 38 Iowa, 35; Galloway v. Courtney, 10 Rich. 414, and modifying S. C., 12 Utah, 439, 43 Pac. Rep. 112, 35 L. R. A. 611); McCombie v. Bennett, 7 N. S. W. L. R. (law) 157.

[1] Bronson v. Bruce, 59 Mich. 467, 476, 26 N. W. Rep. 671, 60 Am. Rep. 307; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. Rep. 1, 13 L. R. A. 97.

[2] Burt v. Advertiser Newspaper Co., *supra*.

[3] Sun Printing & Pub. Co. v. Schenck, 98 Fed. Rep. 925, 40 C. C. A. 163.

[4] 2 Times L. Rep. 593.

[5] 89 N. Y. St. Rep. 35, 55 N. Y. Supp. 35.

[6] Rex v. Holt, 5 T. R. 436; Ingram v. Lawson, 9 C. & P. 333.

[7] Graves v. Waller, 19 Conn. 90, 94.

[8] Fisher v. Patterson, 14 Ohio, 418.

[9] Scripps v. Foster, 41 Mich. 472, 3 N. W. Rep. 216.

will be limited to the actual injury.[1] If the alleged libelous article is one of a series relating to a matter of public [695] concern the defendant may introduce them all to show good faith on his part.[2] All papers referred to in a libel may [696] be admitted for the purpose of explanation and interpretation.[3] A defendant in an action for libel or slander cannot mitigate damages by proving his own bad character[4] or poverty;[5] nor is it any mitigation that he spoke the words in apparent good humor.[6] The defendant cannot prove that the plaintiff has recovered judgment against another party for the publication of the same libel,[7] or that the same article was published by other papers and that suits had been brought against the publishers thereof.[8]

In some early cases of slander, both in England and in this country, it was held that giving the name of the author at the time of speaking the defamatory words was a full excuse, or at least a mitigation of the wrong.[9] Later authorities [697]

[1] Evening News Ass'n v. Tryon, 42 Mich. 549, 4 N. W. Rep. 267, 36 Am. Rep. 450; Scripps v. Reilly, 38 Mich. 23; Detroit Daily Post Co. v. McArthur, 16 id. 451.

[2] Scripps v. Foster, 41 Mich. 742, 3 N. W. Rep. 216.

In Bailey v. Kalamazoo Pub. Co., 40 Mich. 257, Campbell, C. J., said: "The public are interested in knowing the character of candidates for congress; and while no one can lawfully destroy the reputation of a candidate by falsehood, yet if an honest mistake is made (as in misnaming an offense of which the plaintiff has been guilty) in an honest attempt to enlighten the public, it must reduce the damages to a minimum, if the fault is not serious, and there should be no unreasonable responsibility where there is no actual malice." Bronson v. Bruce, 59 Mich. 467, 26 N. W. Rep. 671, 60 Am. Rep. 307. See Smith v. Scott, 2 C. & K. 580.

[3] Nash v. Benedict, 25 Wend. 645; Gould v. Weed, 12 id. 12.

[4] Hastings v. Stetson, 130 Mass. 76.

[5] Meyers v. Malcolm, 6 Hill, 295; Palmer v. Haskins, 28 Barb. 90.

[6] Weaver v. Hendrick, 30 Mo. 502.

[7] Printing Ass'n v. Smith, 55 Fed. Rep. 240, 5 C. C. A. 91; Bennett v. Salisbury, 78 Fed. Rep. 769, 24 C. C. A. 329; Harrison v. Pearce, 1 F. & F. 567; Creevy v. Carr, 7 C. & P. 64. But see Downey v. Stirton, 1 Ont. L. R. 186.

[8] Folwell v. Providence Journal Co., 19 R. I. 551, 37 Atl. Rep. 6.

[9] Earl of Northampton's Case, 12 Coke, 132; Davis v. Lewis, 7 T. R. 17; Hawkes v. Carter, 1 Law Reporter (London), 192; Bennett v. Bennett, 6 C. & P. 588; Binns v. McCorkle, 2 Browne, 79; Hersh v. Ringwalt, 3 Yeates, 508, 2 Am. Dec. 392; Kennedy v. Gregory, 1 Bin. 85; Morris v. Duane, id. 90; Cook v. Barkley, 2 N. J. L. 169, 2 Am. Dec. 343; Smith v. Stewart, 5 Pa. 372; Kelley v. Dillon, 5 Ind. 426; Trabue v. Mays, 3 Dana, 138, 28 Am. Dec. 61; Robinson v. Harvey, 5 T. B. Mon. 519; Parker v. McQueen, 8 B. Mon. 16; Miller v. Kerr, 2 Mc-

qualified the doctrine,[1] requiring either that there be a just reason for the repetition or that the defendant repeat the charge as he heard it and refer to the person from whom he heard it as the author, and that the repetition be without any intention to injure or defame the person to whom the charge refers.[2] A man who wantonly or inconsiderately repeats a defamatory tale fabricated by another is certainly liable to answer in damages for assisting in the propagation of the slander; but he is not answerable in the same degree as the author of the slander unless it should appear he was actuated by malice and an intention to defame.[3] In some cases it was required that the person named as author be responsible and within the state, so that he could be sued for the slander.[4] The later cases in England and in several of the states hold that proof that when the words were spoken the author was named is of itself no defense.[5] In Sans v. Joerris [6] Dixon, C. J., said: "The doctrine, extrajudicially announced in the fourth resolution of the Earl of Northampton's Case,[7] that the repetition of slander, if the name of the inventor be given at the time, is not action-[698] able has never been extended to libel; and even in regard to oral slander has met with disapprobation and may be considered as virtually overruled.[8] Whether this doctrine is placed on the ground that the person who needlessly publishes

Cord, 285, 13 Am. Dec. 722; Church v. Bridgman, 6 Mo. 190. See Folkard's Starkie on Slander, § 317.

[1] McPherson v. Daniels, 10 B. & C. 263; Lewis v. Walter, 4 B. & Ald. 605.

[2] Cummerford v. McAvoy, 15 Ill. 311; Church v. Bridgman, 6 Mo. 190; Haynes v. Leland, 20 Me. 233; Abrams v. Smith, 8 Blackf. 95; Jones v. Chapman, 5 id. 88; Johnston v. Lance, 7 Ired. 448; Skinner v. Grant, 12 Vt. 456; Inman v. Foster, 8 Wend. 602. See Baldwin v. Boulware, 79 Mo. App. 5.

[3] Easterwood v. Quin, 2 Brev. 64, 3 Am. Dec. 700; Folwell v. Providence Journal Co., 19 R. I. 551, 37 Atl. Rep. 6.

[4] Scott v. Peebles, 10 Miss. 546; Trabue v. Mays, 3 Dana, 138, 28 Am. Dec. 61; Johnston v. Lance, 7 Ired. 448; Larkins v. Tarter, 3 Sneed, 681.

[5] McGregor v. Thwaites, 3 B. & C. 24; Bennett v. Bennett, 6 C. & P. 588; Tidman v. Ainslie, 10 Ex. 63; Chevalier v. Brush, Anthon's Law Stud. 186; Mapes v. Weeks, 4 Wend. 659; Inman v. Foster, 8 id. 602; Hotchkiss v. Oliphant, 2 Hill, 510; Austin v. Hanchet, 2 Root, 148; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156; Sans v. Joerris, 14 Wis. 663; Haines v. Welling, 7 Ohio, 253.

[6] 14 Wis. 667.

[7] 12 Coke, 134.

[8] Citing Bennett v. Bennett, 6 C. & P. 588; Lewis v. Walter, 4 B. & Ald. 605; Crane v. Douglass, 2 Blackf. 195; McPherson v. Daniels, 10 B. & C. 263. See, also, Hotchkiss v. Oliphant, 2 Hill, 510.

or repeats a previously invented slander gives it the credit which is due to himself, or, as was said by Chief Justice Best, in De Crespigny v. Wellesley,[1] that it is every man's moral duty if he hear anything injurious to the character of his neighbor which he does not know to be true and does not concern the public or the administration of justice, to lock it up forever in his own breast; or, on the general rule in this world, said to be applicable to nations as well as individuals, that every person should attend to his own affairs, it is, in my judgment, equally sound law, which the security of reputation, the happiness of families and the peace and good order of society demand shall be rigidly enforced in all cases."[2] If time is lost because of slander the defendant cannot escape liability for it by proving that the plaintiff received compensation for his time from a third person.[3]

[1] 5 Bing. 393.

[2] Tidman v. Ainslie, 10 Ex. 63, note.

[3] Elmer v. Fessenden, 154 Mass. 427, 28 N. E. Rep. 299.

CHAPTER XXXV.

MALICIOUS PROSECUTION.

§ 1234, 1235. Nature of the wrong.
1236. Unauthorized suit or appeal.
1237, 1238. Elements of damage.
1239, 1240. Evidence in mitigation.

[699] **§ 1234. Nature of the wrong.** The wrong denoted by this title is of the same nature as libel and slander. It involves among other elements of injury the defamation of the accused. This is so when a criminal charge is maliciously preferred, or its prosecution is maliciously continued,[1] without reasonable or probable cause, in a court having jurisdiction of the subject-matter,[2] though this is not everywhere considered essential.[3] On the termination of an action so brought in an acquittal or discharge a right of action accrues.[4] A judgment,

[1] Finley v. St. Louis Refrigerator & W. G. Co., 99 Mo. 559, 563, 13 S. W. Rep. 87; Hilbrant v. Donaldson, 69 Mo. App. 92, 97.

[2] Vinson v. Flynn, 64 Ark. 453, 460, 43 S. W. Rep. 146, 39 L. R. A. 415, citing Bixby v. Brundige, 2 Gray, 129, 61 Am. Dec. 443; Whiting v. Johnson, 6 Gray, 246; Painter v. Ives, 4 Neb. 122; Braveboy v. Cockfield, 2 McMullen, 270, 273, 39 Am. Dec. 123; Turpin v. Remy, 3 Blackf. 210, 216; Marshall v. Betner, 17 Ala. 832, 836; Munns v. Dupont, 3 Wash. C. C. 31; 1 Am. Lead. Cas. (5th ed.) 259. Shipman v. Fletcher, 20 D. C. 245, is to the same effect.

[3] Ward v. Sutor, 70 Tex. 343, 8 S. W. Rep. 51, 76 Tex. 403, 13 S. W. Rep. 321, 8 Am. St. 606; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Gibbs v. Ames, 119 Mass. 60; Morris v. Scott, 21 Wend. 281, 34 Am. Dec. 236; Hays v. Younglove, 7 B. Mon. 545; Stubbs v. Mulholland, 168 Mo. 47, 88, 67 S. W. Rep. 650.

[4] Cooley on Torts, 180–190; Dowdell v. Carpy, 129 Cal. 168, 61 Pac. Rep. 948; Murphy v. Ernst, 46 Neb. 1, 64 N. W. Rep. 353; Hinds v. Parker, 11 App. Div. 327, 42 N. Y. Supp. 955; Lawrence v. Cleary, 88 Wis. 473, 60 N. W. Rep. 793; Noble v. White, 103 Iowa, 352, 72 N. W. Rep. 556; Robbins v. Robbins, 133 N. Y. 597, 30 N. E. Rep. 977; Stark v. Bindley, 152 Ind. 182, 52 N. E. Rep. 804; Hartshorn v. Smith, 104 Ga. 235, 30 S. W. Rep. 666.

The institution of a judicial proceeding is necessary to the maintenance of an action. Barry v. Third Avenue R. Co., 51 App. Div. 385 64 N. Y. Supp. 615.

Where the plaintiff appeared before a justice of the peace and the case was postponed to a certain time, when she again appeared and no one appeared against her and the justice said there was nothing on his docket, that the warrant had not been returned, and nothing further

though subject to review by an appellate tribunal, is final for the purpose of the founding of an action for malicious prosecution.[1] Where the accusation is acted upon the arrest of the accused, holding him to bail or imprisoning him, and the incidental loss of time and the expense of a defense are among

was ever done, it was held that a prosecution was actually commenced and that it had terminated. Strehlow v. Pettit, 96 Wis. 22, 71 N. W. Rep. 102. See Lueck v. Heisler, 87 Wis. 644, 58 N. W. Rep. 1101; Cooper v. Armour, 42 Fed. Rep. 215, and cases cited.

In Massachusetts the entry of a *nolle prosequi* does not necessarily terminate a criminal suit so as to allow the commencement of an action for malicious prosecution. The effect of so doing will depend upon the facts of each case. Graves v. Dawson, 130 Mass. 78; Langford v. Boston & A. R. Co., 144 Mass. 431, 11 N. E. Rep. 697. But generally the entry of a *nolle prosequi*, unless it was procured by the defendant, is considered sufficient. Stanton v. Hart, 27 Mich. 539; Hatch v. Cohen, 84 N. C. 602, 37 Am. Rep. 630; Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 35; Apgar v. Woolston, 43 N. J. L. 57; Woodman v. Prescott, 66 N. H. 375, 22 Atl. Rep. 456; Marcus v. Bernstein, 117 N. C. 31, 23 S. E. Rep. 38; Welch v. Cheek, 125 N. C. 353, 34 S. E. Rep. 531; Douglas v. Allen, 56 Ohio St. 156, 46 N. E. Rep. 707; Southern Car & F. Co. v. Adams, 131 Ala. 147, 156, 32 So. Rep. 503.

If the accused is brought before an examining magistrate and is discharged, the particular prosecution is at an end, "for, although the complaining witness may voluntarily go before the grand jury and charge the accused with the same offense, and an indictment may even be found, yet such prosecution would be a new one and commenced by the complainant before the grand jury and not founded on the original complaint." Rider v. Kite, 61 N. J. L. 8, 38 Atl. Rep. 754, citing Apgar v. Woolston, 43 N. J. L. 57; Fay v. O'Neill, 36 N. Y. 11; Robbins v. Robbins, 133 N. Y. 597, 30 N. E. Rep. 977; Moyle v. Drake, 141 Mass. 238, 6 N. E. Rep. 520; Mentel v. Hippely, 165 Pa. 558, 30 Atl. Rep. 1021. To the same effect, Marbourg v. Smith, 11 Kan. 554; Hays v. Blizzard, 30 Ind. 457. *Contra*, Hartshorn v. Smith, 104 Ga. 235, 30 S. E. Rep. 666.

A discharge against the protest of one who is under recognizance to appear before a grand jury by the entry of a *nolle*, before action by that body, is a termination of the proceedings. Graves v. Dawson, 133 Mass. 419.

The technical prerequisite is that the prosecution be disposed of in such manner that it cannot be revived and that the prosecutor must be put to a new one. Long v. Rogers, 17 Ala. 546; Clark v. Cleveland, 6 Hill, 344; Vinal v. Core, 18 W. Va. 1.

A discharge upon *habeas corpus* has been held sufficient to base an action upon. Zebley v. Storey, 117 Pa. 478, 12 Atl. Rep. 569.

A dismissal because of a defect in the complaint is not an acquittal; the latter is a deliverance from the charge of guilt. Wakely v. Johnson, 115 Mich. 285, 73 N. W. Rep. 238.

[1] Luby v. Bennett, 111 Wis. 613, 87 N. W. Rep. 804; Marks v. Townsend, 97 N. Y. 590. But see Reynolds v. De Geer, 13 Ill. App. 113; Nebenzahl v. Townsend, 61 How. Pr. 353; Ingram v. Root, 51 Hun, 238, 3 N. Y. Supp. 858.

the natural and proximate consequences.[1] The rule that the prosecution must have terminated rests on the ground that the law will not tolerate inconsistent judgments upon the same question between substantially the same parties. But there is a class of actions in which it has been held that an admission that the alleged malicious suit could not be maintained obviated the necessity of proving that such suit had terminated.[2] Such admission may be by plea or parol. "The bare possibility of inconsistent verdicts should not exempt or relieve a party from responsibility for admitted wrong."[3] If a demurrer admits that a suit was maliciously and hopelessly instituted any presumption to the contrary is overcome and the result of such suit is immaterial.[4] Where a peace warrant is sued out maliciously and without probable cause in an *ex parte* proceeding and the person proceeded against is committed to jail until he gives security for his future conduct, his right of action is perfect on his release,[5] or if he does not give security, on the expiration of the period fixed for his detention.[6] The general rule does not apply to a civil action in which the trial and judgment do not necessarily involve the question of the existence of probable cause; as where an attachment is obtained as auxiliary to such an action.[7] In Texas the claim for damages in such a case may be tried, under a plea of reconvention, with the attachment suit.[8] If a malicious arrest is made of a servant, against whom there is no right of action, the object being solely to injure his master, the latter has a cause of action for the wrong done him.[9]

[1] Saville v. Roberts, 1 Lord Raym. 374; Sonneborn v. Stewart, 2 Woods, 599; Lavender v. Hudgens, 32 Ark. 763; Garvey v. Wayson, 42 Md. 178; Minneapolis Threshing Machine Co. v. Regier, 51 Neb. 402, 70 N. W. Rep. 934; Jones v. Jenkins, 3 Wash. 17, 33, 27 Pac. Rep. 1022; Herbener v. Crossan, — Del. —, 55 Atl. Rep. 223.

[2] Wills v. Noyes, 12 Pick. 326; Page v. Cushing, 38 Me. 527; Page v. Citizens' Banking Co., 111 Ga. 73, 36 S. E. Rep. 418.

[3] Page v. Cushing, 38 Me. 527.

[4] St. Johnsbury, etc. R. Co. v. Hunt, 55 Vt. 570, 45 Am. Rep. 639.

[5] Hyde v. Greuch, 62 Md. 577.

[6] Steward v. Gromett, 7 C. B. (N. S.) 191, 97 Eng. C. L. 191.

[7] Alsop v. Lidden, 130 Ala. 548, 30 So. Rep. 401; Brown v. Master, 104 Ala. 463, 16 So. Rep. 443; Fortman v. Rottier, 8 Ohio St. 548, 72 Am. Dec. 606. Compare Tisdale v. Kingman, 34 S. C. 326, 13 S. E. Rep. 547.

[8] Tynberg v. Cohen, 76 Tex. 409, 13 S. W. Rep. 315.

[9] St. Johnsbury, etc. R. Co. v. Hunt, 55 Vt. 570, 45 Am. Rep. 639.

§ 1235. Same subject. In many cases the injury to reputation is the most serious consequence of the wrong. An accusation made under the forms of law, on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner and may inflict a deeper injury upon the reputation of the party accused than the same words would uttered under any other circumstances.[1] This wrong, however, does not consist entirely in the malicious prosecution of groundless criminal proceedings, though the element of defamation is mostly confined to them. The malicious prosecution,[2] without probable cause, of civil proceedings involving arrest, attachment, sequestration or other interference with person or property, or which is the cause of any special grievance or injury, will, according to the general current of authority, give a right of action.[3] The same has been

[1] Rockwell v. Brown, 36 N. Y. 209; Toomey v. Delaware, etc. R. Co., 4 N. Y. Misc. 392, 24 N. Y. Supp. 108; Morgan v. Duffy, 94 Tenn. 686, 30 S. W. Rep. 735.

A person who procures the arrest and imprisonment of another under an affidavit which states facts not constituting a crime, but which a judicial officer holds shows the commission of a crime, is liable to an action for malicious prosecution, the affidavit being false, and malice and want of probable cause being found. Navarino v. Dubrap, 66 N. J. L. 620, 50 Atl. Rep. 353.

[2] It is "carrying on" a prosecution to cause a warrant to be issued, having the defendant therein arrested and his goods seized, having him brought before a committing magistrate, procuring continuances of the preliminary hearing, and requiring him to give bond for his appearance before the committing magistrate, notwithstanding the prosecution was finally abandoned in the committing court. Page v. Citizens' Banking Co., 111 Ga. 73, 36 S. E. Rep. 418. But it is otherwise where nothing more is done than to make an affidavit before a justice of the peace charging an offense against the law, no arrest being made. Swift v. Witchard, 103 Ga. 193, 29 S. E. Rep. 762.

[3] Wengert v. Beashore, 2 N. J. L. 232; Henderson v. Jackson, 9 Abb. Pr. (N. S.) 393; Herman v. Brookerhoff, 8 Watts, 240; Tancred v. Leyland, 16 Q. B. 669; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59, 17 Ala. 689, 52 Am. Dec. 194; McKellar v. Couch, 34 Ala. 336; Stewart v. Cole, 46 id. 646; Collins v. Hayte, 50 Ill. 353; Lawrence v. Hagerman, 56 id. 68, 8 Am. Rep. 674; Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Hayden v. Shed, 11 Mass. 500; Lindsay v. Larned, 17 id. 190; Weaver v. Page, 6 Cal. 681; Pierce v. Thompson, 6 Pick. 193; Barhans v. Sanford, 19 Wend. 417; Besson v. Southard, 10 N. Y. 236; Churchill v. Siggers, 3 El. & Bl. 937; Austin v. Debnam, 3 B. & C. 139; Sinclair v. Eldred, 4 Taunt. 7; Farley v. Danks, 4 El. & Bl. 493; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Nelson v. Danielson, 82 Ill. 545; Tomlinson v. Warner, 9 Ohio, 103; Fortman v. Rottier, 8 Ohio St. 548, 72 Am. Dec. 606; Burkhart v.

[700] held of proceedings to have a person declared insane or bankrupt without probable cause,[1] and in cases of malicious abuse of legal process.[2]

Jennings, 2 W. Va. 242; Savage v. Brewer, 16 Pick. 453, 28 Am. Dec. 255; De Medina v. Grove, 10 Q. B. 168; Preston v. Cooper, 1 Dill. 589; Robinson v. Kellum, 6 Cal. 399; Cox v. Taylor, 10 B. Mon. 17; Walser v. Thies, 56 Mo. 89; Holliday v. Sterling, 62 id. 321; McCullough v. Grishobber, 4 W. & S. 201; Spengler v. Davy, 15 Gratt. 381; Wood v. Weir, 5 B. Mon. 544; Fullenwider v. McWilliams, 7 Bush, 389; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Hoyt v. Macon, 2 Colo. 113; Williams v. Hunter, 3 Hawks, 545, 14 Am. Dec. 599, note; Clark v. Pearce, 80 Tex. 146, 15 S. W. Rep. 787; Brown v. Master, 104 Ala. 451, 16 So. Rep. 443; Brounstein v. Sahlein, 65 Hun, 365, 20 N. Y. Supp. 213; Mitchell v. Silver Lake Lodge, 29 Ore. 294, 45 Pac. Rep. 798; Gundermann v. Buschner, 73 Ill. App. 180; Noonan v. Orton, 30 Wis. 358; O'Neill v. Johnson, 53 Minn. 439, 55 N. W. Rep. 601, 39 Am. St. 615; Foster v. Pitts, 63 Ark. 387, 38 S. W. Rep. 1114.

It is otherwise as to a levy upon real estate where there is no disturbance of the possession, use or enjoyment of the premises. Trawick v. Martin-Brown Co., 79 Tex. 460, 14 S. W. Rep. 564; Heath v. Lent, 1 Cal. 410; Brandon v. Allen, 28 La. Ann. 60; Muldoon v. Rickey, 103 Pa. 110, 49 Am. Rep. 117.

An exception is made to this rule where the levy of the attachment prevents the sale of the land and it depreciates in value thereafter. Wetsel v. Tillman, 3 Tex. Civ. App. 559, 22 S. W. Rep. 980. But not where the depreciation is the only damage; that is not such a direct effect of the levy as entitles the plaintiff to recover. Drew v. Ellis, 6 Tex. Civ. App. 507, 26 S. W. Rep. 95.

If the attachment defendant has submitted to the attachment, paid the just debt for which it was issued and the costs, he cannot maintain an action for malicious prosecution. Hibbard v. Ryan, 46 Ill. App. 313.

If the suit which is alleged to have been maliciously brought was against the makers of a joint note who were jointly engaged in business and jointly owned the property attached in that suit, they may unite in an action to recover for injury to their joint credit, business or property. Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. Rep. 154, citing Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Medbury v. Watson, 6 Met. 257.

Damages cannot be recovered for the malicious seizure of property without probable cause as though it had been converted. Burton v. St. Paul, etc. R. Co, 33 Minn. 189, 22 N. W. Rep. 300.

The attachment must be levied or there is no ground of action. Maskell v. Barker, 99 Cal. 642, 34 Pac. Rep. 340.

[1] Sonneborn v. Stewart, 2 Woods, 599, 98 U. S. 187; Brown v. Chapman, 1 W. Bl. 427; Chapman v. Pickersgill, 2 Wils. 145; Lockenour v. Sides, 57 Ind. 360, 26 Am. Rep. 58; Quartz Hill Consolidated Gold Mining Co. v. Eyre, 11 Q. B. Div. 674.

[2] Hogg v. Pinckney, 16 S. C. 387; Churchill v. Siggers, 3 El. & B. 929; Savage v. Brewer, 16 Pick. 453; Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574; Jennings v. Florence, 2 C. B. (N. S.) 467; Austin v. Debnam, 3 B. & C. 139; Krug v. Ward, 77 Ill. 603; Grainger v. Hill, 4 Bing. N. C. 212; Elsee v. Smith, 1 D. & R. 97; Schaper

An action for a malicious prosecution may be maintained against a private corporation,[1] and the malice of its officers or employees accompanying the performance of acts within, or incidental to, the discharge of their duties, is imputable to the corporation,[2] unless those acts were intended as a mere cover for the accomplishment of some independent and wrongful purpose.[3] A public corporation may also be so liable if it specially authorized the action to be brought by any of its officers.[4]

"The fact that, according to the practice in the court where the criminal proceedings were had, the chief of police signed and swore to the written complaint, does not save the defendant if he intentionally induced the chief of police to do so, acting in good faith on the defendant's information."[5] One who aids and abets another, or ratifies his acts in a malicious prosecution, is equally liable with the principal actor.[6] An officer who serves criminal process which shows on its face that the complainant knew of the falsity of the accusation therein made is liable for malicious prosecution, and if he makes an arrest under such warrant is also liable for false imprisonment;

v. Sutter, 63 Ill. App. 257; Antcliff v. June, 81 Mich. 477, 45 N. W. Rep. 1019, 21 Am. St. 533, 10 L. R. A. 621; Zinn v. Rice, 161 Mass. 571, 37 N. E. Rep. 747; Clark v. Nordholt, 121 Cal. 26, 53 Pac. Rep. 400.

Where one is maliciously arrested under bail process upon an allegation of fraud he must allege that the order of arrest was vacated before he began his action, but he need not aver that the action in which the arrest was made had terminated. In such an action it is not necessary to prove express malice or malice in fact, nor actual damage; deprivation of liberty and injury to reputation, feelings and person will support a verdict. Hogg v. Pinckney, 16 S. C. 387, distinguishing Frierson v. Hewitt, 2 Hill (S. C.), 499.

[1] Willard v. Holmes, 142 N. Y. 492, 37 N. E. Rep. 480; Scott v. Dennett Surpassing Coffee Co., 51 App. Div. 321, 64 N. Y. Supp. 1016; Cornford v. Carlton Bank, [1899] 1 Q. B. 392. [1900] 1 Q. B. 22.

[2] Gulf, etc. R. Co. v. James, 73 Tex. 12, 10 S. W. Rep. 744, 15 Am. St. 743; Waters v. West Chicago Street R. Co., 101 Ill. App. 265.

[3] Willard v. Holmes, 2 N. Y. Misc. 303, 21 N. Y. Supp. 998. See Kutner v. Fargo, 20 N. Y. Misc. 207, 45 N. Y. Supp. 753.

[4] Horton v. Newell, 17 R. I. 571, 23 Atl. Rep. 910.

[5] Tangney v. Sullivan, 163 Mass. 166, 39 N. E. Rep. 799, citing Gibbs v. Ames, 119 Mass. 60. 66; Woodworth v. Mills, 61 Wis. 44, 55, 60, 20 N. W. Rep. 728, 50 Am. Rep. 135; Kline v. Shuler, 8 Ired. 484, 486, 49 Am. Dec. 402; Danby v. Beardsley, 43 L. T. (N. S.) 603, 604. See § 1240.

[6] Mauldin v. Ball, 104 Tenn. 597, 58 S. W. Rep. 248.

the two causes of action may be joined.[1] Where a search-warrant is maliciously procured it is not necessary that the affidavit or indictment should have sufficiently charged the defendant with a crime to authorize him to maintain an action for malicious prosecution.[2]

Whether an action may be maintained for maliciously and without reasonable or probable cause prosecuting a civil action not involving an arrest of the person or seizure of property is a question upon which courts are not agreed.[3] On principle it is difficult to deny the right of action where the taxable costs are not a full compensation for the trouble and expense of defending the groundless suit. In the words of Lord Campbell:[4] "To put into force the process of the law, maliciously and [701] without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person,

[1] Lueck v. Heisler, 87 Wis. 644, 58 N. W. Rep. 1101. But see Davis v. Pacific Telephone & Tel. Co., 127 Cal. 312, 59 Pac. Rep. 698.

[2] Harlan v. Jones, 16 Ind. App. 398, 45 N. E. Rep. 481.

[3] See as opposing the right, Mitchell v. Southwestern R., 75 Ga. 398; Ely v. Davis, 111 N. C. 24, 15 S. E. Rep. 878; Terry v. Davis, 114 N. C. 31, 18 S. E. Rep. 943; Rice v. Day, 34 Neb. 100, 51 N. W. Rep. 464; Mitchell v. Silver Lake Lodge, 29 Ore. 294, 45 Pac. Rep. 798; Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N. E. Rep. 569, 67 Am. St. 242, 66 Ill. App. 516; Norcross v. Otis Bros. & Co., 152 Pa. 481, 25 Atl. Rep. 575, 34 Am. St. 669; Dooley v. Meisenbach, 83 Ill. App. 75; Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 56 N. E. Rep. 198, 76 Am. St. 433, distinguishing Coal Co. v. Upson, 40 Ohio St. 17, and Pope v. Pollock, 46 id. 367, 21 N. E. Rep. 356, 4 L. R. A. 255; Luby v. Bennett, 111 Wis. 613, 619, 87 N. W. Rep. 804, 87 Am. St. 897; Houghton v. Oakley, 21 N. S. W. L. R. (law) 26; Bartholomew v. Metropolitan L. Ins. Co., 1 Ohio Dec. 267; McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. Rep. 606; Runge v. Franklin, 72 Tex. 590, 13 Am. St. 833, 3 L. R. A. 417, 10 S. W. Rep. 721; Cross v. Commercial Agency, 18 N. Z. L. R. 153; Barker v. Sands & McDougall Co., 16 Vict. L. R. 719. See Mayer v. Walter, 64 Pa. 283; McNamee v. Minke, 49 Md. 122; Byne v. Moore, 5 Taunt. 187; Gregory v. Derby, 8 C. & P. 749; Clarke v. Postan, 6 id. 423; Closson v. Staples, 42 Vt. 245; Woods v. Finnell, 13 Bush, 628; Lawyer v. Loomis, 3 Thomp. & C. 393; Newfield v. Copperman, 15 Abb. Pr. (N. S.) 360; Berry v. Adamson, 6 B. & C. 528; Wanzer v. Wyckoff, 9 Hun, 178; Cardival v. Smith, 109 Mass. 158, 12 Am. Rep. 682; Allgor v. Stillwell, 6 N. J. L. 166; Woodmansee v. Logan, 2 id. 93; 1 Am. Lead. Cas. 200-224; Cooley on Torts, 188, 189; Lockenour v. Sides, 57 Ind. 360, 26 Am. Rep. 58; Wetmore v. Mellinger, 64 Iowa, 741, 18 N. W. Rep. 870, 52 Am. Rep. 465; Smith v. Hintrager, 67 Iowa, 109, 24 N. W. Rep. 744; Johnson v. King, 64 Tex. 226; Smith v. Adams, 27 id. 30; Eberley v. Rupp, 90 Pa. 259.

[4] Churchill v. Siggers, 3 El. & B. 929.

there is that conjunction of injury and loss which is the foundation of an action on the case." The expenses and trouble of defending such an action are proper elements of damage, and why should they alone not be considered sufficient to maintain the action? Where the claim which is the subject of the action is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery for the expenses incurred and damages sustained should be as fully recognized as if his property had been attached or his body taken charge of by the plaintiff.[1] In England such an action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the companies' acts 1862, 1867, to wind up a trading company, although no pecuniary loss or special damage to the company can be proved, because the presentation of the petition, which was required to be made public before it could be acted upon, was necessarily calculated to injure the credit of the company.[2] Much was said in disposing of the questions in this case which looks toward the denial of a right of action for a malicious prosecution where the bringing of an ordinary

[1] McCardle v. McGinley, 86 Ind. 538; Marbourg v. Smith, 11 Kan. 554; Magmer v. Renk, 65 Wis. 364, 27 N. W. Rep. 26; Woods v. Finnell, 13 Bush, 628: Eastin v. Bank, 66 Cal. 123, 4 Pac. Rep. 1106, 56 Am. Rep. 77; Closson v. Staples, 42 Vt. 209 (fully reviewing the English and early American cases); Smith v. Burrus, 106 Mo. 94, 16 S. W. Rep. 881, 27 Am. St. 329, 13 L. R. A. 59; Brady v. Erwin, 48 Mo. 533; Kolka v. Jones, 6 N. D. 461, 71 N. W. Rep. 558, 66 Am. St. 615; Lipscomb v. Shofner, 96 Tenn. 112, 33 S. W. Rep. 818; McPherson v. Runyon, 41 Minn. 524, 43 N. W. Rep. 392, 16 Am. St. 727; Whipple v. Fuller, 11 Conn. 582, 29 Am. Dec. 330; Cox v. Taylor's Adm'r, 10 B. Mon. 17; Pangburn v. Bull, 1 Wend. 345; Allen v. Codman, 139 Mass. 136, 29 N. E. Rep. 537; Johnson v. Meyer, 36 La. Ann. 333; Hoyt v. Macon, 2 Colo. 113; Antcliff v. June, 81 Mich. 477, 45 N. W. Rep. 1019, 21 Am. St. 533, 10 L. R. A. 621; Pope v. Pollock, 46 Ohio St. 367, 21 N. E. Rep. 356, 15 Am. St. 608, 4 L. R. A. 255 (distinguished in Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 56 N. E. Rep. 198); Brand v. Hinchman, 68 Mich. 590, 36 N. W. Rep. 664, 13 Am. St. 362; O'Neill v. Johnson, 53 Minn. 439, 55 N. W. Rep. 601, 39 Am. St. 615; Dolan v. Thompson, 129 Mass. 205; Sartwell v. Parker, 141 Mass. 405, 5 N. E. Rep. 807; Eickhoff v. Fidelity & C. Co., 74 Minn. 139, 76 N. W. Rep. 1030; Wade v. National Bank, 114 Fed. Rep. 377; Cooper v. Armour, 42 id. 215, 8 L. R. A. 47 (it seems). The opinion of Corliss, C. J., in Kolka v. Jones, *supra*, is very interesting and instructive, and one of the fullest discussions of the question to be found in the reports of recent years.

[2] Quartz Hill Consolidated Gold Mining Co. v. Eyre, 11 Q. B. Div. 674.

action does not, as a natural or necessary consequence, involve any injury to a man's property, for the reason that the only costs which the law recognizes, and for which it will compensate him, are the costs properly incurred in the action itself. Bowen, L. J., said: "For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs it is because he does not deserve them; if he deserves them he will get them in the original action: if he does not deserve them he ought not to get them in a subsequent action. Therefore the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."[1] In cases of this nature the want of probable cause must be very palpable or the plaintiff cannot succeed.[2] The damages include compensation for the defendant's time, trouble and expense in defending the action.[3] In an action for the malicious prosecution of a writ of attachment, for levying the same, for making an excessive levy and for improper conduct in making it there may be a recovery for injuries caused by trespass upon the realty or upon personalty of the plaintiff, or for unnecessarily closing his store in the due execution of the writ, or for an excessive levy upon goods or for an unlawful and damaging detention of the goods so levied on. All these matters are component parts of the malicious prosecution, and redress for them may be had in the action brought therefor.[4] Without determining whether or not a plaintiff who wrongfully procures the appointment of a receiver may be liable for the injury sustained by the defendant, the Texas court has ruled that there cannot be a recovery for loss resulting from the receiver's acts after his appointment, nor for injury to credit, or the loss of speculative profits.[5]

§ 1236. Unauthorized suit or appeal. Though there is no element of malice in one who unauthorizedly brings a suit or prosecutes an appeal in the name of another, he is liable to the

[1] Id.

[2] Eickhoff v. Fidelity & C. Co., 74 Minn. 139, 76 N. W. Rep. 1030.

[3] McCardle v. McGinley, 86 Ind. 538.

[4] Brown v. Master, 104 Ala. 451, 16 So. Rep. 443.

[5] Coverdill v. Seymour, 96 Tex. 1, 9, 57 S. W. Rep. 37.

other party thereto for such damages as may result to him.[1] Evidence of express malice is competent.[2] If the plaintiff in an action to recover for such a wrong disclaims special damages for injury to his character the defendant cannot attack it either for the purpose of rebutting the evidence of malice or in mitigation of damages.[3] The recovery in such an action where an appeal is taken is not affected by the fact that the person who was unauthorizedly named as plaintiff in the original suit had a right of action against the defendant.[4] Where an appeal is taken without authority the damages to the person in whose favor the judgment was rendered (it remaining in full force) cannot exceed the balance due on it, with the costs of the proceeding in which it was rendered and of the action brought to enforce its collection.[5]

§ 1237. Elements of damage. These are thus classi- [703] fied by Holt, C. J., in Saville v. Roberts:[6] 1. Damages to a man's fame, as if the matter whereof he is accused be [704] scandalous. 2. Where a man is put in danger to lose his life or limb or property. 3. Damage to a man's property, as where he is forced to spend money in necessary charges to acquit himself of the crime. 4. Any special damage. In general terms, said Graves, J., the elements of damage are the expense the plaintiff incurred about the prosecution complained of, his loss of time, his deprivation of liberty and the loss of the society of his family, the injury to his fame, personal mortification and the smart and injury of the malicious arts and acts and oppression of the defendant.[7] The injury to reputation

[1] Foster v. Dow, 29 Me. 442; Smith v. Hyndman, 10 Cush. 554; Bond v. Chapin, 8 Met. 31; Streeper v. Ferris, 64 Tex. 12.

[2] Smith v. Hyndman, 10 Cush. 554.

[3] Id.

[4] Foster v. Dow, 29 Me. 442.

[5] Streeper v. Ferris, 64 Tex. 12.

[6] 1 Ld. Raym. 374.

[7] Hamilton v. Smith, 39 Mich. 222; Wilson v. Bowen, 64 id. 133, 141, 31 N. W. Rep. 81; Killebrew v. Carlisle, 97 Ala. 535, 12 So. Rep. 167; Ten Cate v. Fansler, 10 Okl. 712, 65 Pac. Rep. 375.

If the court had no jurisdiction of the subject-matter of the action the recovery will be limited to the damages resulting from the mere prosecution, such as the expense of defending it and the annoyance and discredit caused thereby; there cannot be a recovery for the arrest. Shipman v. Fletcher, 20 D. C. 245.

Evidence as to the number of persons present when the plaintiff was arrested is inadmissible, it not appearing that the defendant was responsible for any abuse of the officer's power or discretion. Marks v.

must be estimated and reparation made for it on the same considerations which govern in actions for slander or libel.[1] According to numerous adjudications the plaintiff may give evidence as part of his case of his previous good character, and that the defendant had knowledge of it.[2] Such evidence cannot be rebutted by evidence of specific acts; but the plaintiff may be cross-examined concerning his character.[3] Bodily and mental suffering may be taken into account, and the latter where there is no physical injury or pain.[4] So the jury may take into consideration the indignity.[5] If a man be falsely and maliciously indicted for a crime which is a scandal to him and hurts his fame an action lies although the indictment be insufficient or an *ignoramus* be found,[6] for though no expense may be incurred the mischief of the slander has been effected.[7]

Hastings. 101 Ala. 165, 13 So. Rep. 297.

[1] Sheldon v. Carpenter, 4 N. Y. 578; Lord v. Guyot, — Colo. —, 70 Pac. Rep. 683; Ambs v. Atchison, etc. R. Co., 114 Fed. Rep. 317; Miles v. Walker, — Neb. —, 92 N. W. Rep. 1014.

[2] Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. Rep. 728; Blizzard v. Hays, 46 Ind. 169; Israel v. Brooks, 23 Ill. 575; Funk v. Amor, 7 Ohio Ct. Ct. 419; McIntire v. Levering. 148 Mass. 546, 20 N. E. Rep. 191; Glace v. Hummel, 10 Pa. Dist. Rep. 110; Miller v. Brown, 3 Mo. 127; Scott v. Fletcher, 1 Overt. 488. See § 1210; Stubbs v. Mulholland, 168 Mo. 47, 79, 67 S. W. Rep. 650.

[3] Waters v. West Chicago Street R. Co., 101 Ill. App. 265.

[4] Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. Rep. 864; Rowlands v. Samuel, 11 Q. B. 39; Shatto v. Crocker, 87 Cal. 629, 25 Pac. Rep. 921 (injury to the feelings is provable under the general allegation of damages); Merchant v. Pielke, 10 N. D. 48, 84 N. W. Rep. 574, citing the text; Davis v. Seeley, 91 Iowa, 583, 60 N. W. Rep. 183, 51 Am. St. 356; Wheeler v. Hanson, 161 Mass. 370, 376, 37 N. E. Rep. 382, 42 Am. St. 408; Friel v. Plumer, 69 N. H. 498, 43 Atl. Rep. 618, 76 Am. St. 189; Jones v. Jenkins, 3 Wash. 17, 27 Pac. Rep. 1022; Herbener v. Crossan, — Del. —, 55 Atl. Rep. 223; Ambs v. Atchison, etc. R. Co., *supra;* Cohn v. Saidel, 71 N. H. 558, 53 Atl. Rep. 800.

[5] McWilliams v. Hoban, 42 Md. 56; Merchant v. Pielke, *supra;* Rule v. McGregor, 115 Iowa, 323, 88 N. W. Rep. 814.

[6] Saville v. Roberts, 1 Ld. Raym. 374.

[7] Id.

It is said in Minneapolis Threshing Machine Co. v. Regier, 51 Neb. 402, 406, 70 N. W. Rep. 934: "We believe it is the general doctrine that the defendant in an action for malicious prosecution will not be permitted to allege the insufficiency of the complaint on which he caused the plaintiff's arrest to shield himself from the consequences of his act. Chambers v. Robinson, 2 Str. 691; Wicks v. Fentham, 4 T. R. 247; Pippet v. Hearn, 5 B. & Ald. 634; Parli v. Reed, 30 Kan. 534, 2 Pac. Rep. 635; Bell v. Keepers, 37 Kan. 64, 14 Pac. Rep. 542; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. Rep.

The condition or number of the plaintiff's family is not material to the question of damages.[1] But in Iowa it has been held competent to show that the plaintiff, who had been arrested on a criminal charge, had a family, the condition of his family at the time, including the fact that he had a crippled son, who was under medical treatment, and with whom he sat up nights, not to show special damage based upon an injury resulting to the plaintiff's family, but for the purpose of showing the character and extent of the plaintiff's mental suffering. It was not necessary to specially plead these facts.[2] Injury resulting from the sickness of the plaintiff's wife by reason of the malicious prosecution is too remote.[3] Damages cannot be recovered for injuries done to the plaintiff's clerk who was in the store when the levy of a writ was made on the goods.[4]

The damages may consist in the personal labor, trouble and expense imposed on the plaintiff in procuring his acquittal or discharge, and the pain and anxiety of mind naturally occasioned by the pendency of a criminal accusation.[5] The plaintiff may prove in aggravation of damages the length of his imprisonment, expenses, situation and circumstances.[6] He may show the condition of the jail in which he was confined and the treatment received therein. The case of Zebley v. Storey[7] to the contrary was disapproved, and it is said to be clearly

969; Porter v. Gjertsen, 37 Minn. 386, 34 N. W. Rep. 746; Lueck v. Heisler, 87 Wis. 644, 58 N. W. Rep. 1101; Stocking v. Howard, 73 Mo. 25; Stancliff v. Palmeter, 18 Ind. 321; Dennis v. Ryan, 65 N. Y. 385; Strehlow v. Pettit, 96 Wis. 22, 71 N. W. Rep. 102. *Contra*, Newman v. Davis, 58 Iowa, 447, 10 N. W. Rep. 852; Krause v. Spiegel, 94 Cal. 370, 29 Pac. Rep. 707, 28 Am. St. 137, 15 L. R. A. 707; Satilla Manuf. Co. v. Cason, 98 Ga. 14, 25 S. E. Rep. 909, 58 Am. St. 287.

[1] Reisan v. Mott, 42 Minn. 49, 43 N. W. Rep. 691, 18 Am. St. 489.

[2] Davis v. Seeley, 91 Iowa, 583, 60 N. W. Rep. 183, 51 Am. St. 356; Flam v. Lee, 116 Iowa, 289, 90 N. W. Rep. 70.

[3] Hampton v. Jones, 58 Iowa, 317, 12 N. W. Rep. 276.

[4] Brown v. Master, 104 Ala. 451, 464, 16 So. Rep. 443.

[5] Ambs v. Atchison, etc. R. Co., 114 Fed. Rep. 317; Ruth v. St. Louis Transit Co., — Mo. App. —, 71 S. W. Rep. 1055.

[6] Folkard's Starkie on Slander & L., § 651; Spear v. Hiles, 67 Wis. 350, 30 N. W. Rep. 506; Cointement v. Cropper, 41 La. Ann. 303, 6 So. Rep. 127; Neys v. Taylor, 12 S. D. 488, 81 N. W. Rep. 901; Ten Cate v. Fansler, 10 Okl. 7, 65 Pac. Rep. 375; Merchant v. Pielke, 10 N. D. 48, 84 N. W. Rep. 574. The ruling in Peterson v. Toner, 80 Mich. 350, 45 N. W. Rep. 346, indicates that the recovery of liberal compensation will be disapproved. Compare Ruth v. St. Louis Transit Co., *supra*.

[7] 117 Pa. 478, 12 Atl. Rep. 569.

against the weight of authority.[1] Where a female was falsely and maliciously prosecuted for perjury and suffered in health in consequence and was rendered insane, an increased recovery on that account was sustained.[2] There can be but one assessment of damages in an action of this nature, and all the damages, those accruing after as well as before the bringing of the action, must be included in it.[3] Where the plaintiff had been arrested on a charge of embezzlement it was competent for him to show the nature of his business and the tools required in it, the difficulty which he had in getting employment, the trouble to which he was subjected by taking away the property on which he relied to obtain other tools, the amount of his earnings, the injury to his feelings and reputation, and the indignity which he suffered.[4] The plaintiff may recover not only for an unlawful arrest and imprisonment and the expenses of his defense, but also for the injury to his fame and reputation occasioned by the false accusation.[5] But publicity given to the

[1] Drumm v. Cessnum, 61 Kan. 467, 60 Pac. Rep. 314, citing Abrahams v. Cooper, 81 Pa. 232; Fenelon v. Butts, 53 Wis. 344, 10 N. W. Rep. 501; San Antonio, etc. R. Co. v. Griffin, 20 Tex. Civ. App. 91, 48 S. W. Rep. 542; Atchison, etc. R. Co. v. Rice, 36 Kan. 593, 14 Pac. Rep. 229; Spear v. Hiles, 67 Wis. 350, 30 N. W. Rep. 506; Johnson v. McDaniel, 5 Ohio Dec. 717. To the same effect is Flam v. Lee, 116 Iowa, 289, 90 N. W. Rep. 70.

[2] Plath v. Braunsdorff, 40 Wis. 107. The condition of a child born of a mother who was pregnant when incarcerated in jail is not an element of damages. This was held in view of the testimony in the particular case and the common knowledge that there are numerous causes for physical, mental or nervous deficiency in children; that healthy women do sometimes give birth to deficient children, and that nervous or otherwise unhealthy women often bear healthy children. Spear v. Hiles, 67 Wis. 361, 30 N. W. Rep. 511.

[3] Fay v. Guynon, 131 Mass. 31.

[4] Wheeler v. Hanson, 161 Mass. 370, 376, 37 N. E. Rep. 382, 42 Am. St. 408.

[5] Sheldon v. Carpenter, 4 N. Y. 579; Fagnan v. Knox, 40 N. Y. Super. Ct. 41; Lunsford v. Dietrich, 86 Ala. 250, 5 So. Rep. 461, 11 Am. St. 37; Clarke v. American Dock & Imp. Co., 35 Fed. Rep. 478; Blunk v. Atchison, etc. R. Co., 38 id. 311; Kellebrew v. Carlisle, 97 Ala. 535, 12 So. Rep. 167; Swales v. Grubbs, 6 Ind. App. 477, 33 N. E. Rep. 1124; Spencer v. Cramblett, 56 Kan. 794, 44 Pac. Rep. 985; Drumm v. Cessnum, 61 Kan. 467, 60 Pac. Rep. 314; Wheeler v. Hanson, 161 Mass. 370, 37 N. E. Rep. 382, 42 Am. St. 408; Grimes v. Bowerman, 92 Mich. 258, 52 N. W. Rep. 751; Minneapolis Threshing Machine Co. v. Regier, 51 Neb. 402, 70 N. W. Rep. 934; Gerken v. Ruppert, 33 N. Y. Misc. 382, 67 N. Y. Supp. 589; Johnson v. Johnson, 5 Ohio Dec. 717; Neys v. Taylor, 12 S. D. 488, 81 N. W. Rep. 901; Hlubek v. Pinske, 84 Minn. 363, 87 N. W. Rep. 939; Jackson v.

fact of the prosecution by the entry of the plaintiff's name upon detective police annals cannot be proven unless they were kept pursuant to law or the fact that such entry would be made was known to the defendant.[1] Extra legal entries in the docket of an examining magistrate are not competent evidence against the defendant.[2] But there are well-considered cases which hold that the defendant is liable for all the injury done to the reputation of the plaintiff, and that it is competent to prove newspaper publications containing plain accounts of the prosecution or the arrest,[3] especially if the defendant caused or secured their publication.[4]

The right to recover the expense incurred in defending the criminal prosecution is not affected by the fact that payment thereof has not been made.[5] A recovery in the action for malicious prosecution bars a subsequent action of slander for the accusation uttered for the purpose of having the arrest made

Bell, 5 S. D. 257, 58 N. W. Rep. 671, citing the text; Kolka v. Jones, 6 N. D. 461, 478, 71 N. W. Rep. 558, 66 Am. St. 615; Flam v. Lee, 116 Iowa, 289, 90 N. W. Rep. 70.

"When it does not appear that the attorneys' fees and other expenses are obviously excessive, testimony of the amounts paid will constitute a *prima facie* case, and it will be assumed in such case that the attorneys' fees so paid were reasonable, unless the contrary appears." Drumm v. Cessnum, *supra*. But in Minnesota and North Dakota the value of the attorney's services must be proved or they cannot be recovered for. Mitchell v. Davies, 51 Minn. 168, 53 N. W. Rep. 863; Hlubek v. Pinske, 84 Minn. 363, 87 N. W. Rep. 939; Kolka v. Jones, 6 N. D. 461, 478, 71 N. W. Rep. 558, 66 Am. St. 615.

[1] Garvey v. Wayson, 42 Md. 178.

[2] Fletcher v. Chicago & N. R. Co., 109 Mich. 363, 67 N. W. Rep. 330.

[3] Minneapolis Threshing Machine Co. v. Regier, 51 Neb. 402, 70 N. W. Rep. 934, approving Filer v. Smith, 96 Mich. 347, 55 N. W. Rep. 999, 35 Am. St. 603. Fletcher v. Chicago & N. R. Co., 109 Mich. 363, 67 N. W. Rep. 330, is to the same effect.

The last case holds that a further statement that the person arrested proposed to push the matter to the limit is inadmissible unless its publication was prompted by the prosecutor. If the article is so framed that the admissible part cannot be read without introducing the objectionable matter, the whole should be excluded; but it would be competent to have it appear before the jury that the fact of the arrest was published in the paper.

[4] Waters v. West Chicago Street R. Co., 101 Ill. App. 265; Cooney v. Chase, 81 Mich. 203, 45 N. W. Rep. 833.

[5] Walker v. Pittman, 108 Ind. 341, 9 N. E. Rep. 175; Minneapolis Threshing Machine Co. v. Regier, 51 Neb. 402, 70 N. W. Rep. 934; Anderson v. Provident Life & Trust Co., 26 Wash. 192, 203, 66 Pac. Rep. 415. *Contra*, Elder v. Kutner, 97 Cal. 490, 32 Pac. Rep. 563. See § 85.

and on the occasion when it was made.[1] The jury are to determine the amount of damages when the essential facts for the [705] maintenance of the action have been established, and may take into consideration the expense to which the plaintiff has been subjected, his trouble and anxiety, and the ignominy of being arraigned at the bar of justice as an offender against the laws;[2] they are to take into consideration the circumstances of the case and award such damages as will not only compensate for the wrong and indignity suffered in consequence of the defendant's wrongful act, but they may also award exemplary or punitive damages as a punishment for such act.[3] In Texas injury to credit may be recovered for under a general averment showing the facts which may justify an award of exemplary damages.[4] The allowance of such damages is unauthorized where the property seized is used for the purpose of violating the criminal law, either on account of the seizure or the resulting injury to the reputation of the person who carried on the illegal business in which it was used. If he conducted other business in connection with that which was illegal exemplary damages can be recovered only for the wrong done him in connection with that which was not illegal.[5] A

[1] Sheldon v. Carpenter, 4 N. Y. 579.

[2] Thompson v. Massey, 3 Me. 305; Fagnan v. Knox, 40 N. Y. Super. Ct. 41.

[3] Hurlbut v. Hardenbrook, 85 Iowa, 606, 52 N. W. Rep. 510; McWilliams v. Hoban, 42 Md. 56; Weaver v. Page, 6 Cal. 681; Russell v. Dennison, 45 Cal. 337; Lytton v. Baird, 95 Ind. 349; Western News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. Rep. 786; Ruth v. St. Louis Transfer Co., — Mo. App. —, 71 S. W. Rep. 1055; Atkinson v. Van Cleave, 25 Ind. App. 508, 57 N. E. Rep. 731; Byford v. Girton, 90 Iowa, 661, 57 N. W. Rep. 588; Davis v. Seeley, 91 Iowa, 583, 60 N. W. Rep. 183, 51 Am. St. 356; Spencer v. Cramblett, 56 Kan. 794, 44 Pac. Rep. 985; Proctor Coal Co. v. Moses, 19 Ky. L. Rep. 419, 40 S. W. Rep. 681; Baldwin v. Von der Ahe, 184 Pa. 116, 39 Atl. Rep. 7; Wright v. Waddell, 89 Iowa, 350, 56 N. W. Rep. 650; Eagleton v. Kabrich, 66 Mo. App. 231; Brown v. Master, 111 Ala. 397, 20 So. Rep. 344; Merchant v. Pielke, 10 N. D. 48, 84 N. W. Rep. 574. *Contra*, Wilson v. Bowen, 64 Mich. 133, 31 N. W. Rep. 81.

The defendant's wealth may be proved to affect the amount of punitive damages. Peck v. Small, 35 Minn. 465, 29 N. W. Rep. 69; Sexson v. Hoover, 1 Ind. App. 65, 27 N. E. Rep. 105.

In Russell v. Bradley, 50 Fed. Rep. 515, a verdict for $12,500 was sustained on the ground that the punitive damages to be allowed were within the discretion of the jury so long as there was no evidence of prejudice, perverseness or corruption.

[4] Curlee v. Rose, 27 Tex. Civ. App. 259, 65 S. W. Rep. 197.

[5] Kauffman v. Babcock, 67 Tex. 241, 2 S. W. Rep. 878.

partner who does not advise, direct or know of the institution of a suit which is prosecuted in the firm name until after its termination is not liable for vindictive damages,[1] nor for those which are compensatory.[2] If the action for malicious prosecution is by one of two defendants in the criminal proceedings, while evidence of malice towards both is competent to show the defendant's state of mind, yet for the purpose of fixing the punitive damages the defendant's words and acts towards the plaintiff are only to be considered.[3] Damages are recoverable for the injury caused by the inability to dispose of attached property.[4] Where growing crops are levied on the damages are measured by the difference in their value at the time of the levy and at the time of the release thereof; the time after the release which might be necessary to secure and market the crops is not to be regarded.[5]

§ 1238. Same subject. The plaintiff, when he has been prosecuted for a crime maliciously and without probable cause, may recover for the expense he has been put to as well as for the annoyance he has undergone and for the injury to his feelings.[6] The amount of recovery for the expense incurred will be limited to such sum as is reasonable.[7] Where the statutes require that the party summoned in garnishee proceedings shall appear and answer under oath, one who has been garnished and has not appeared cannot recover the expense incurred in sending an agent to appear for him unless the garnishee is a corporation.[8] It has been held in some cases that it is discretionary with the jury to allow the plaintiff the amount or any portion of it paid in defending against the prosecution;[9] generally, however, he is entitled to recover not only the costs and expenses attending the defense of the groundless suit,

[1] Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. Rep. 93, 56 Am. Rep. 169.

[2] Marks v. Hastings, 101 Ala. 165, 13 So. Rep. 297.

[3] Ellis v. Hampton, 123 N. C. 194, 31 S. E. Rep. 473.

[4] Lord v. Guyot, — Colo. —, 70 Pac. Rep. 683.

[5] Pratt v. Hampe, 114 Iowa, 237, 86 N. W. Rep. 292.

[6] Rowlands v. Samuel, 11 Q. B. 39.

[7] Eastin v. Bank, 66 Cal. 123, 4 Pac. Rep. 1106, 56 Am. Rep. 77; Hurlbut v. Boaz, 4 Tex. Civ. App. 371, 23 S. W. Rep. 446. See note to § 1237.

[8] Cornell v. Payne, 115 Ill. 63, 3 N. E. Rep. 718.

[9] Gregory v. Chambers, 78 Mo. 294; Bradlaugh v. Edwards, 11 C. B. (N. S.) 377.

without reference to taxable costs, including counsel fees,[1] but also consequential damages which naturally and proximately result therefrom.[2] In an early California case a suit was brought on a paid bill of exchange and property attached and held for four months, when it was released by giving a bond. The jury gave a verdict, in an action for a malicious prosecution of that suit and suing out that attachment, for $15,000, which was sustained. The court say: "In cases of this nature there is no settled rule as to the amount to be recovered. The jury are not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration the character and position of the parties and all the circumstances attending the transaction. In such cases we cannot disturb a verdict unless it clearly appears that injustice has been done."[3] In an English case[4] a judgment creditor who had recovered judgment for £115, of which £100 were afterwards paid, caused the debtor to be taken on execution for the full amount, and this being found to have been done maliciously and without probable cause, and special damages being alleged because [706] the plaintiff was prevented from attending to his business, injured in his credit and character, and incurred expense in procuring his liberation by a judge's order, he was held, on demurrer, entitled to judgment.[5] Under an allegation that by

[1] Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Woods v. Finnell, 13 Bush, 628; Smith v. Smith, 20 Hun, 559, note; Magmer v. Renk, 65 Wis. 364, 27 N. W. Rep. 26; n. 3, p. 3577.

[2] Evidence that the plaintiff became ill by reason of the prosecution and unable to attend to business for a specified time, thereby forfeiting his earnings under a special contract, is inadmissible under the general allegation that he was greatly injured in his business. Oldfather v. Zent, 14 Ind. App. 89, 41 N. E. Rep. 555.

[3] Weaver v. Page, 6 Cal. 681; Peck v. Small, 35 Minn. 465, 29 N. W. Rep. 69; Williams v. Casebeer, 126 Cal. 77, 89, 58 Pac. Rep. 380; Spencer v. Cramblett, 56 Kan. 794, 44 Pac. Rep. 985; Baldwin v. Von der Ahe, 184 Pa. 116, 39 Atl. Rep. 7; Neys v. Taylor, 12 S. D. 488, 81 N. W. Rep. 901. See Russell v. Dennison, 45 Cal. 337; Phelps v. Cogswell, 70 id. 201, 11 Pac. Rep. 628.

Verdicts have been set aside for excessiveness in the following recent cases: O'Boyle v. Shively, 65 Ill. App. 278; Davis v. Seeley, 91 Iowa, 583, 60 N. W. Rep. 183, 51 Am. St. 356; Jensen v. Hallam, 51 Neb. 492, 70 N. W. Rep. 1121; Billingsley v. Maas, 93 Wis. 176, 67 N. W. Rep. 49; Cointement v. Cropper, 41 La. Ann. 303, 6 So. Rep. 127; Phelps v. Cogswell, 70 Cal. 501, 11 Pac. Rep. 628; Gray v. Tanning, 73 Conn. 115, 46 Atl. Rep. 831.

[4] Churchill v. Siggers, 3 El. & B. 929.

[5] Lawrence v. Hagerman, 56 Ill. 68,

reason of his prosecution for the violation of the liquor law the plaintiff's credit was impaired so that his creditors demanded security for their debts, and he was obliged to mortgage his property to give such security, it may be shown that the plaintiff was a merchant; that he bought goods in a certain city; that he was indebted to several parties therefor; that they, on hearing of the pendency of the charge, refused him further credit, and required a mortgage, which he was obliged to give in order to avoid being sued.[1] The suing out of other attachments upon the property of the plaintiff after its attachment by the defendant is the natural result of the latter's wrongful act, and the fact that the other attachments contributed to the injury sustained by the plaintiff does not absolve the defendant from liability.[2] It is the natural and probable result of menacing the possession of a boarding house that a loss of boarders should follow, and that persons who might have become boarders should be deterred from doing so. The expense and trouble incurred in giving a bond, including counsel fees, to prevent expulsion is also ground of damage.[3]

If money has been paid to secure the release of property maliciously seized the damages are measured by the payment.[4] In an Iowa case a party holding a lease of a mine for a specified time was ejected therefrom by a judgment, afterwards reversed, in an action of forcible entry and detainer maliciously instituted. In an action for this proceeding it was held that the measure of damages was the reasonable value of the use of the premises for the time the plaintiff had been kept out of possession, and for any permanent injury to his leasehold interest sustained by reason of the mine caving or otherwise getting out of repair through the failure of the defendant to use ordinary care during the time he held possession.[5] If the result of a malicious attachment levied without probable cause upon a growing crop was to so demoralize the tenants and

8 Am. Rep. 674; Tiblier v. Alford, 12 Fed. Rep. 262.

[1] Fine v. Navarre, 104 Mich. 93, 62 N. W. Rep. 142.

[2] Grimes v. Bowerman, 92 Mich. 258, 266, 52 N. W. Rep. 751; § 40.

[3] Slater v. Kimbro, 91 Ga. 217, 18 S. E. Rep. 296, 44 Am. St. 19.

[4] Clark v. Pearce, 80 Tex. 146, 15 S. W. Rep. 787.

[5] Moffatt v. Fisher, 47 Iowa, 473; Newark Coal Co. v. Upson, 40 Ohio St. 17.

laborers of the owner that they, because of distrust of his financial ability to perform his contracts with them, leave him, and the injury resulting to his credit prevents him from obtaining other laborers and supplies, in consequence of which his crops are injured, such injury is an element of damage to the extent of the resulting depreciation.[1] In an action for maliciously and without probable cause procuring a merchant to be adjudged a bankrupt, under which adjudication, before the proceeding was dismissed, he was deprived of his entire stock of goods, and his store shut up for about thirteen months, the jury were instructed that the plaintiff was entitled to recover the actual damage to his goods, for the breaking up of his business, and the destruction of his credit. "The value of his own time," say the court, "is also a fair charge, as he has been obliged to give his attention to the proceedings instituted against him, and has not been able to pursue any business." It was also held that his expenses for lawyers' fees in following up and setting aside the proceedings in bankruptcy were a fair item of charge to be allowed.[2] In Krug v. Ward[3] it was held that evidence of the payment of an attorney's fee, and expenses of defending the groundless suit, was admissible, though the former was paid by another for the plaintiff. But in assessing the damages the expenses of prosecuting the action for malicious prosecution are not deemed the natural and proximate consequence of the wrong complained of, and cannot be taken into consideration.[4] They can be awarded only as a punishment, and their allowance is discretionary with the jury.[5] Where a sum of money was garnished and by reason of its non-payment to the plaintiff's firm they became unable to pay their rent and employees, and because of such inability their landlord canceled their lease and their employees refused to continue to work, in consequence of which their business was ruined and their prospects blighted,

[1] Brewer v. Jacobs, 22 Fed. Rep. 217.

[2] Sonneborn v. Stewart, 2 Woods, 599, reversed as to allowance of attorneys' fees and on other points, 98 U. S. 187; Fullenwider v. McWilliams, 7 Bush, 389.

[3] 77 Ill. 603.

[4] Stewart v. Sonneborn, 98 U. S. 197; Good v. Mylin, 8 Pa. 51, 49 Am. Dec. 493; Alexander v. Herr, 11 Pa. 537; Stopp v. Smith, 71 id. 285; Hicks v. Foster, 13 Barb. 663.

[5] First Nat. Bank v. Williams, 62 Kan. 431, 63 Pac. Rep. 744.

the court held these grounds of damage too remote and uncertain.[1]

For this wrong the injured party is entitled to ade- [707] quate compensation covering all the elements of the particular injury. Therefore the jury, in determining the amount, will consider the nature of the prosecution and its natural effect on reputation, credit and private feelings; the incidental consequences of arrest, holding to bail or of interference with property; the consequential loss of time and any other loss, as the expense of defending. Malice is of the gist of the action, and the damages for other than pecuniary items may be greatly increased or diminished by the evidence on that subject. Where there is actual and express malice exemplary damages may be recovered[2] if actual damage has been sustained.[3] In fixing the amount of vindictive damages the jury should exercise a fair and reasonable discretion, keeping in view the nature of the wrong done, the aggravating circumstances[4] and the wealth of the defendant,[5] though evidence on the last point is not everywhere admissible.[6] If successive suits were brought by the defendant upon the same groundless claim that fact is admissible to show malice.[7] Where the

[1] O'Neill v. Johnson, 53 Minn. 439, 55 N. W. Rep. 601, 39 Am. St. 615.

[2] McWilliams v. Hoban, 42 Md. 56; Sonneborn v. Stewart, 2 Woods, 599; Wanzer v. Bright, 52 Ill. 35; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. Rep. 864; Lunsford v. Dietrich, 86 Ala. 250, 5 So. Rep. 461; Lytton v. Baird, 95 Ind. 349; Peden v. Mail, 118 id. 560, 20 N. E. Rep. 446; McGarry v. Missouri Pacific R. Co., 36 Mo. App. 340; Orr v. Seiler, 1 Penny. 445; Jacobs v. Crum, 62 Tex. 401 (malice of an agent, under the facts, warranted the imposition of exemplary damages against his principal); Farrar v. Talley, 68 id. 349, 4 S. W. Rep. 558; Vinal v. Core, 18 W. Va. 1, 48; Spear v. Hiles, 67 Wis. 350, 30 N. W. Rep. 506; Tiblier v. Alford, 12 Fed. Rep. 262; Jarman v. Stewart, id. 266 (construing the Tennessee statute, and holding that punitive damages may be recovered whether the action be upon an attachment bond or the case); Sexson v. Hoover, 1 Ind. App. 65, 27 N. E. Rep. 105; Brown v. McBride, 24 N. Y. Misc. 235, 52 N. Y. Supp. 620; n. 3, p. 3574.

[3] Schippel v. Norton, 38 Kan. 567, 16 Pac. Rep. 804.

[4] Frankfurter v. Bryan, 12 Ill. App. 549, 556; Phelps v. Cogswell, 70 Cal. 201, 11 Pac. Rep. 628; Howe v. Oldham, 69 Hun, 57, 23 N. Y. Supp. 700.

[5] Spear v. Hiles, 67 Wis. 350, 30 N. W. Rep. 506; Lord v. Guyot, — Colo. —, 70 Pac. Rep. 683; Peck v. Small, 35 Minn. 465, 29 N. W. Rep. 69; Atkinson v. Van Cleave, 25 Ind. App. 508, 57 N. E. Rep. 731; Eggett v. Allen, 106 Wis. 633, 82 N. W. Rep. 556; Eagleton v. Kabrich, 66 Mo. App. 231.

[6] Southern Car & F. Co. v. Adams, 131 Ala. 147, 159, 32 So. Rep. 503.

[7] Magmer v. Renk, 65 Wis. 364, 27

malicious prosecution was based upon some of the counts in an information the plaintiff was held not to be barred of the right to recover actual damages because he did not distinguish between those which were caused by the malicious counts and those which resulted from the others. In other words, the defendant cannot escape liability because he united groundless accusations with those for which there was probable cause.[1]

In an action for the malicious abuse of process by making an excessive attachment levy evidence of legal acts of third persons is admissible to prove the damage sustained by injuring the plaintiff's business, as the publication of the notice of the attachment in a mercantile paper and inquiries concerning the attachment by the reporters of mercantile agencies and others. But in showing the amount of the plaintiff's damages by the injury done to his business, including the good will, though a somewhat wide range of evidence may be proper, it is opening too broad a field to cover a period of nine years before the attachment was made and eleven months thereafter, especially if the attachment was in force but two days and the plaintiff's stores were not closed or trade in them stopped. The court observed: The connection between the attachment and the decrease in the volume of business following it is not sufficiently close, and too many other elements enter into the matter; for example, the methods of business pursued before and after the attachment, the amount of advertising done, changes in clerks and other employees, the amount of pains and attention given to the business, and the state of trade in general. Without determining whether an attack of pneumonia suffered by the plaintiff was a natural and probable consequence of an excessive attachment, the fact could not be established by his testimony, it not appearing that he had special knowledge of the subject.[2]

§ 1239. Evidence in mitigation. The plaintiff is required to show that the defendant was actuated by malice and that the

N. W. Rep. 26; Cooney v. Chase, 81 Mich. 203, 45 N. W. Rep. 833; Epstein v. Berkowsky, 64 Ill. App. 498; Severns v. Brainard, 61 Minn. 265, 63 N. W. Rep. 477.

[1] Boogher v. Bryant, 86 Mo. 42; West v. Platt, 127 Mass. 367, 371; Tangney v. Sullivan, 163 Mass. 166, 39 N. E. Rep. 799.

[2] Zinn v. Rice, 161 Mass. 571, 576, 37 N. E. Rep. 747.

prosecution was without probable cause.[1] Except in Louisiana[2] the absence of such cause does not raise a legal presumption of malice, but the jury may infer malice as matter of fact from the want of it.[3] The want of probable cause, however, cannot be inferred from malice.[4] In these respects no distinction is made between criminal and civil actions,[5] and this is true respecting the advice of counsel as a defense.[6] The important

[1] Paddock v. Watts, 116 Ind. 146, 18 N. E. Rep. 518, 9 Am. St. 832; Girot v. Graham, 41 La. Ann. 511, 6 So. Rep. 815; Hicks v. Faulkner, 8 Q. B. Div. 167; Winfield v. Kean, 1 Ont. 193; Magowan v. Rickey, 64 N. J. L. 402, 45 Atl. Rep. 804; Ferguson v. Arnow, 142 N. Y. 580, 37 N. E. Rep. 626; Ball v. Rawles, 93 Cal. 222, 28 Pac. Rep. 937, 27 Am. St. 174; Whitehead v. Jessup, 2 Colo. App. 76, 29 Pac. Rep. 916; Stewart v. Sonneborn, 98 U. S. 187; Florence Oil & Refining Co. v. Huff, 14 Colo. App. 281, 59 Pac. Rep. 624; Stuckey v. Savannah, etc. R. Co., 102 Ga. 782, 29 S. E. Rep. 920; Helwig v. Beckner, 149 Ind. 131, 46 N. E. Rep. 644; Wright v. Hayter, 5 Kan. App. 638, 47 Pac. Rep. 546; Albin Co. v. Mumford, 21 Ky. L. Rep. 1613, 55 S. W. Rep. 913; Le Clear v. Perkins, 103 Mich. 131, 61 N. W. Rep. 357, 26 L. R. A. 627; McClafferty v. Philp, 151 Pa. 86, 24 Atl. Rep. 1042; Messman v. Ihlenfeldt, 89 Wis. 585, 591, 62 N. W. 522; Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., 120 U. S. 141, 7 Sup. Ct. Rep. 452; Ambs v. Atchison, etc. R. Co., 114 Fed. Rep. 317; Richards v. Jewett, — Iowa, —, 82 N. W. Rep. 689. Cartwright v. Elliott, 45 Ill. App. 458, is not in harmony with the almost unbroken current of authority.

[2] Weil v. Israel, 42 La. Ann. 955, 964, 8 So. Rep. 826.

[3] Harpham v. Whitney, 77 Ill. 32; Frankfurter v. Bryan, 12 Ill. App. 549; Paddock v. Watts, 116 Ind. 146, 18 N. E. Rep. 518, 9 Am. St. 832; Ambs v. Atchison, etc. R. Co., *supra;* Decoux v. Lieux, 33 La. Ann. 392; Jacobs v. Crum, 62 Tex. 401; Vinal v. Core, 18 W. Va. 1; Tiblier v. Alford, 12 Fed. Rep. 262; Winfield v. Kean, 1 Ont. 193; Roy v. Goings, 112 Ill. 656; Levy v. Brannan, 39 Cal. 485; Harkruder v. Moore, 44 id. 144; Mowry v. Whipple, 8 R. I. 360; Straus v. Young, 36 Md. 246; Lawyer v. Loomis, 3 Thomp. & C. 393; Carson v. Edgworth, 43 Mich. 241, 5 N. W. Rep. 282; Heath v. Heape, 1 H. & N. 478; Wanzer v. Wyckoff, 9 Hun, 178; Wheeler v. Nesbitt, 24 How. 544; Humphries v. Parker, 52 Me. 505; Sutton v. Johnson, 1 T. R. 493; Pullen v. Glidden, 68 Me. 562; Parker v. Parker, 102 Iowa, 500, 71 N. W. Rep. 421; McKenna v. Heinlen, 128 Cal. 97, 60 Pac. Rep. 668; Stewart v. Sonneborn, 98 U. S. 187; Florence Oil & Refining Co. v. Huff, 14 Colo. App. 281, 59 Pac. Rep. 624; Hicks v. Brantley, 102 Ga. 264, 29 S. E. Rep. 459; Helwig v. Beckner, 149 Ind. 131, 46 N. E. Rep. 644; Torsch v. Dell, 88 Md. 459, 41 Atl. Rep. 903; Langley v. East River Gas Co., 41 App. Div. 470, 58 N. Y. Supp. 992; McClafferty v. Philp, 151 Pa. 86, 24 Atl. Rep. 1042; Wuest v. American Tobacco Co., 10 S. D. 394, 73 N. W. Rep. 903.

[4] Id.; Brown v. Smith, 83 Ill. 291; Wright v. Hayter, 5 Kan. App. 638, 47 Pac. Rep. 546; Lang v. De Luca, 108 La. 304, 32 So. Rep. 329; Cohn v. Saidel, 71 N. H. 558, 53 Atl. Rep. 800.

[5] Stewart v. Sonneborn, 98 U. S. 192; Le Clear v. Perkins, 103 Mich. 131, 61 N. W. Rep. 357, 26 L. R. A. 637, and cases cited.

[6] Le Clear v. Perkins, *supra;* Emerson v. Cochran, 111 Pa. 619, 4 Atl.

inquiry, therefore, in such cases is whether there was probable cause, which is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the facts essential to the prosecution exist.[1] Probable cause does not depend on the actual state of the case in point of fact, [708] but upon the honest and reasonable belief of the party commencing the prosecution, if he is an ordinarily prudent or reasonable person.[2] In some cases the test as to what constitutes probable cause is less favorable to the defendant than that given, the words "honest and strong suspicion" being omitted. Thus, in Minnesota the term is defined, as to civil actions, to be such reasons, supported by facts and circumstances, as will warrant a cautious[3] man in the belief that his

Rep. 498; Allen v. Codman, 139 Mass. 136, 29 N. E. Rep. 537; Lemay v. Williams, 32 Ark. 166; Brewer v. Jacobs, 22 Fed. Rep. 222; Kompass v. Light, 122 Mich. 186, 80 N. W. Rep. 1008.

[1] Bacon v. Towne, 4 Cush. 238; Carl v. Ayers, 53 N. Y. 17; Foshay v. Ferguson, 2 Denio, 617; Harpham v. Whitney, 77 Ill. 42; Scanlan v. Cowley, 2 Hilt. 489; Heyne v. Blair, 62 N. Y. 22; Lacey v. Mitchell, 23 Ind. 67; Rice v. Ponder, 7 Ired. 390; Fitzgibbon v. Brown, 43 Me. 169; Ash v. Marlow, 20 Ohio, 119; Barron v. Mason, 31 Vt. 197; Decoux v. Lieux, 33 La. Ann. 392; Hyde v. Greuch, 62 Md. 577; Wilson v. Bowen, 64 Mich. 133, 31 N. W. Rep. 81; Blunk v. Atchison, etc. R. Co., 38 Fed. Rep. 311; Torsch v. Dell, 88 Md. 459, 467, 41 Atl. Rep. 903.

[2] James v. Phelps, 11 Ad. & E. 483; Ambs v. Atchison, etc. R. Co., 114 Fed. Rep. 317; Heslop v. Chapman, 23 L. J. (Q. B.) 49; Hall v. Suydam, 6 Barb. 83; Ball v. Rawles, 93 Cal. 222, 28 Pac. Rep. 937, 27 Am. St. 174; Turner v. Ambler, 10 Q. B. 260; Struby-Estabrook Mercantile Co. v. Kyes, 9 Colo. App. 190, 48 Pac. Rep. 663; Florence Oil & Refining Co. v. Huff, 14 Colo. App. 281, 59 Pac. Rep. 624; Messman v. Ihlenfeldt, 89 Wis. 585, 591, 62 N. W. Rep. 522; Stamper v. Raymond, 38 Ore. 16, 24, 62 Pac. Rep. 20; Foster v. Pitts, 63 Ark. 387, 392, 38 S. W. Rep. 1114; Willard v. Holmes, 142 N. Y. 492, 37 N. E. Rep. 480. Compare Bell v. Pearcy, 5 Ired. 83; Delegal v. Highley, 3 Bing. N. C. 950; Haddrick v. Heslop, 12 Q. B. 267. See Vinal v. Core, 18 W. Va. 1.

[3] The use of "cautious" for "prudent" is error in Pennsylvania; the former may mean over-prudent or timorous. McClafferty v. Philp, 151 Pa. 86, 90, 24 Atl. Rep. 1042. This refinement has not always been made. Ross v. Langworthy, 13 Neb. 492, 14 N. W. Rep. 515; Messman v. Ihlenfeldt, 89 Wis. 585, 593, 62 N. W. Rep. 522; Munns v. Dupont, 3 Wash. C. C. 31; Richey v. McBean, 17 Ill. 63; Ash v. Marlow, 20 Ohio, 119; Cole v. Curtis, 16 Minn. 182; Center v. Spring, 2 Iowa, 393; Hess v. Webb, 53 Ill. App. 53; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. Rep. 913.

The use of the words "really cautious" was condemned in Eggett v. Allen, 106 Wis. 634, 637, 82 N. W. Rep. 556. But the use of "man of ordinary caution, prudence and good conscience" has been approved.

action and the means taken in prosecuting it are legally just and proper.[1] This definition has been applied in other cases, and without reference to whether the prosecution complained of was civil or criminal.[2] It is not substantially different from that given by the supreme court of the United States: "Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."[3] The definition given by Chief Justice Shaw in Bacon v. Towne[4] has been approved: "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty."[5] As defined by Hawkins, J., reasonable and probable cause is an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be, first, an honest belief of the accuser in the guilt of the accused; second, such belief must be based on an honest conviction of the circumstances which led the accuser to that conclusion; third, such second-mentioned belief must be based upon reasonable grounds; by this is meant such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourth, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused.[6]

Clement v. Major, 8 Colo. App. 86, 44 Pac. Rep. 876.

The word "reasonably" may be used instead of the word "ordinarily." Billingsley v. Maas, 93 Wis. 176, 179, 67 N. W. Rep. 49.

[1] Burton v. St. Paul, etc. R. Co., 33 Minn. 189, 22 N. W. Rep. 300.

[2] Van Sickle v. Brown, 68 Mo. 635; Sharpe v. Johnston, 76 id. 660; McGarry v. Missouri Pacific R. Co., 36 Mo. App. 340. See Vinal v. Core, 18 W. Va. 1, 27.

[3] Wheeler v. Nesbitt, 24 How. 544; Spear v. Hiles, 67 Wis. 350, 30 N. W. Rep. 506; Clement v. Major, 8 Colo. App. 86, 44 Pac. Rep. 776; Messman v. Ihlenfeldt, 89 Wis. 585, 62 N. W. Rep. 522.

[4] 4 Cush. 217.

[5] Eggett v. Allen, 106 Wis. 633, 638, 82 N. W. Rep. 556.

[6] Hicks v. Faulkner, 8 Q. B. Div. 167, 171.

If the prosecutor is so injured by the offense committed that he is not capable of drawing his conclusions with the same impartiality that a disinterested person would have done the jury, in passing upon the question of probable cause, may consider that fact.[1]

The meaning of the word "malice" in this form of action is not to be taken as merely a feeling of spite or hatred towards the individual who has been prosecuted, but as being that state of mind which denotes that the party was actuated by improper and indirect motives. "If a prosecution is initiated upon weak and unsubstantial ground, for purposes of annoyance or of frightening and coercing the party prosecuted into the settlement of a demand, the surrender of goods, or for the accomplishment of any other object, aside from the apparent object of the prosecution, and the vindication of public justice, the party who puts the criminal law into motion under such circumstances lays himself open to the charge of being actuated by malice. Such motives are indirect and improper, and for the gratification of which the criminal law should not be made the instrument."[2] "Probable cause, unlike malice, is not determined by the standard of the particular defendant, but of the ordinarily prudent and cautious man, exercising conscience, impartiality and reason, without prejudice, upon the particular facts.[3] And so, a mere honest belief in guilt is not enough; it must be founded upon reasonable grounds.[4] For though he

[1] Spear v. Hiles, 67 Wis. 361, 30 N. W. Rep. 511.

[2] Johns v. Marsh, 52 Md. 333; Torsch v. Dell, 88 Md. 459, 468, 41 Atl. Rep. 903; Ross v. Langworthy, 13 Neb. 492, 14 N. W. Rep. 515; Foster v. Pitts, 63 Ark. 387, 38 S. W. Rep. 1114: Stamper v. Raymond, 38 Ore. 16, 22, 62 Pac. Rep. 20; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. Rep. 913.

Proof that criminal process had been used as a means for the collection of a debt is not conclusive in establishing the want of probable cause and the existence of malice; at most it is *prima facie*. Wenger v. Phillips, 195 Pa. 214, 45 Atl. Rep. 927, 78 Am. St. 810. Malice may be inferred in such a case. Ross v. Langworthy, 13 Neb. 492, 14 N. W. Rep. 515; Morgan v. Duffy, 94 Tenn. 686, 30 S. W. Rep. 735; Sebastian v. Cheney, 86 Tex. 497, 25 S. W. Rep. 691; Kimball v. Bates, 50 Me. 308; Paddock v. Watts, 116 Ind. 146, 18 N. E. Rep. 518, 9 Am. St. 832; Peterson v. Reisdorph, 49 Neb. 529, 68 N. W. Rep. 943. Such a use of such process is malicious prosecution. Lueck v. Heisler, 87 Wis. 644, 58 N. W. Rep. 1101.

[3] Heyne v. Blair, 62 N. Y. 19, and cases cited.

[4] Farnam v. Feeley, 56 N. Y. 451; Fagnan v. Knox, 66 id. 525.

have belief, and yet act negligently and irrationally, the prosecutor may not have probable cause. The test, then, is not exclusively limited to the actual knowledge in fact of the defendant, but may be put to any knowledge which he could or ought to have gained in the exercise of ordinary prudence and caution. And if by such exercise a proper investigation might have cleared away suspicious circumstances, and yet was omitted, here may be evidence of no probable cause.[1] Were the rule otherwise, the omission of ordinary care and prudence would equal the exercise thereof and rashness would rank with caution. And then, too, the question would not turn on the belief of the ordinarily prudent and cautious man; but on the belief of a defendant who might have been imprudent and incautious."[2] This doctrine is inapplicable where the prosecutor has sought and obtained the advice of the proper prosecuting officer and made a full, fair and correct statement of all the facts that are known to him, or which he had reason to believe existed, without suppression, evasion or falsehood and as he believes them to be, if he has acted honestly upon the advice given.[3] The complainant is not bound to make a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the accused;[4] though he may not shut his eyes to other facts if those within his knowledge put him upon inquiry respecting them.[5] Generally only such facts as were known to the defendant when he instituted the suit are to be considered in determining the question of probable cause;[6] but in North Carolina the defendant may protect himself by any additional facts tending to show that the plaintiff was guilty, though he may not have known them when he began the prosecu-

[1] Addison on Torts, 221; Sweet v. Smith, 42 App. Div. 502, 509; Farnam v. Feeley, *supra;* Grinnell v. Stewart, 32 Barb. 544; 2 Greenl. on Ev. 452; Barron v. Mason, 31 Vt. 189; Abrath v. Northeastern R. Co., 11 Q. B. Div. 440, 442, 450; Tabert v. Cooley, 46 Minn. 366, 49 N. W. Rep. 124, 13 L. R. A. 463.

[2] Per Jenks, J., in Scott v. Dennett Surpassing Coffee Co., 51 App. Div. 321, 64 N. Y. Supp. 1016.

[3] Dunlap v. New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 Pac. Rep. 29; Johnson v. Miller, 69 Iowa, 562, 29 N. W. Rep. 743, 58 Am. Rep. 231; Holliday v. Holliday, 123 Cal. 26, 36, 55 Pac. Rep. 703.

[4] Johnson v. Miller, *supra.*

[5] Dunlap v. New Zealand F. & M. Ins. Co., *supra.*

[6] Jacobs v. Crum, 62 Tex. 401; Smith v. King, 62 Conn. 515, 26 Atl. Rep. 1059.

tion.[1] And in Missouri the defendant is chargeable with knowledge of all the facts which he could have learned with due diligence before the prosecution was begun.[2] The plaintiff who sues one who has been unsuccessful in a civil action must show very clearly and satisfactorily the existence of all the fundamental facts constituting his case.[3]

Where the proceeding instituted is of a criminal character the finding of an indictment or the commitment of the accused by an examining magistrate is *prima facie* evidence of such cause,[4] but is not conclusive.[5] The waiver of a preliminary examination has the same weight as such a finding or commitment.[6] The refusal to find an indictment or to commit the accused is very persuasive evidence that probable cause did not exist,[7] but it is not sufficient to show a want of such cause.[8] The final termination of the criminal case in favor of the plaintiff in the suit for malicious prosecution is not *prima facie* evidence of malice.[9] When the court of first in-

[1] Johnson v. Chambers, 10 Ired. 287, 32 N. C. 287; Thurber v. Eastern Building & L. Ass'n, 118 N. C. 129, 24 S. E. Rep. 730.

[2] Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. Rep. 650.

[3] Ferguson v. Arnow, 142 N. Y. 580, 37 N. E. Rep. 626.

[4] Sharpe v. Johnston, 76 Mo. 660, 670; Louisville, etc. R. Co. v. Hendricks, 13 Ind. App. 10, 40 N. E. Rep. 82, 41 id. 14; Ricord v. Central Pacific R. Co., 15 Nev. 167; Ganea v. Southern Pacific R. Co., 51 Cal. 140.

[5] Bauer v. Clay, 8 Kan. 580, 585; Ross v. Hixon, 46 Kan. 550, 26 Pac. Rep. 955, 12 L. R. A. 760; Spalding v. Lowe, 56 Mich. 366, 23 N. W. Rep. 46; Darnell v. Sallee, 7 Ind. App. 581, 34 N. E. Rep. 1020; Whaling v. Wells, 50 La. Ann. 562, 23 So. Rep. 447.

[6] Hess v. Oregon Baking Co., 31 Ore. 503, 49 Pac. Rep. 803.

[7] Sharpe v. Johnston, 70 Mo. 660, 670; Bostick v. Rutherford, 4 Hawks, 83; Vinal v. Core, 18 W. Va. 1, 42; Brown v. Vittur, 47 La. Ann. 607, 17 So. Rep. 193; Messman v. Ihlenfeldt, 89 Wis. 585, 591, 62 N. W. Rep. 522; Eastman v. Monastes, 32 Ore. 291, 51 Pac. Rep. 1095, 67 Am. St. 531; Stamper v. Raymond, 38 Ore. 16, 34, 62 Pac. Rep. 20; Frost v. Holland, 75 Me. 108, 112; Secor v. Babcock, 2 Johns. 203; Straus v. Young, 36 Md. 246; Bornholdt v. Louillard, 36 La. Ann. 103; Bartright v. Tammany, 158 Pa. 545, 28 Atl. Rep. 135, 38 Am. St. 853; Beihofer v. Loeffert, 159 Pa. 374, 28 Atl. Rep. 216. *Contra*, Israel v. Brooks, 23 Ill. 575; Thompson v. Beacon Rubber Co., 56 Conn. 493, 16 Atl. Rep. 554; Heldt v. Webster, 60 Tex. 207; Apgar v. Woolston, 43 N. J. L. 57.

[8] Magowan v. Rickey, 64 N. J. L. 402, 45 Atl. Rep. 804; Perry v. Sulier, 92 Mich. 72, 52 N. W. Rep. 801.

[9] Helwig v. Beckner, 149 Ind. 131, 134, 46 N. E. Rep. 644; Eastman v. Monastes, 32 Ore. 291, 51 Pac. Rep. 1095, 67 Am. St. 531; Apgar v. Woolston, 43 N. J. L. 60; Purcell v. McNamara, 9 East, 361; Scott v. Simpson, 1 Sandf. 601; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505;

stance has jurisdiction to render final judgment in a criminal case, if the hearing is fair, without fraud, and the testimony for the prosecution is free from perjury and results in conviction, such conviction is conclusive on the question of probable cause for the prosecution, though the defendant may be acquitted on appeal.[1] There is at least one exception to this rule in addition to those which rest upon fraud or perjury. The evidence of probable cause afforded by the conviction may be rebutted by proof of any facts which show that the conviction was obtained under circumstances depriving it of any probative effect. Where the petition in an action for malicious prosecution alleged that the plaintiff had been convicted in the county court and on appeal in the district court, that the conviction had been reversed by the supreme court and the cause thereafter dismissed; that the defendant, when he instituted the prosecution, was aware of certain facts which in law established the innocence of the plaintiff; that he had testified to those facts in the county court, whence it appeared that the conviction in the lower courts was not upon any consideration of evidence which justified it, but was due solely to a misapprehension of law, the want of probable cause was well pleaded.[2] The want of such cause is in some degree a negative, and the plaintiff can only be called upon to give slight evidence of it.[3] A discharge because of the lack of jurisdiction, and also, after indictment, under advice of counsel, the bill being *non prossed* for the same reason, no investigation having been made into the merits, are not facts from which either want of probable cause or malice may be in-

Stone v. Crocker, 24 Pick. 81; Stewart v. Sonneborn, 98 U. S. 187; Brant v. Higgins, 10 Mo. 728; Ganea v. Southern Pacific R. Co., 51 Cal. 140; Thomas v. Muehlmann, 92 Ill. App. 571.

[1] Thomas v. Muehlmann, 92 Ill. App. 571, 575, citing, among others, these cases: Parker v. Farley, 10 Cush. 281; Griffis v. Sellars, 2 Dev. & Batt. 492, 31 Am. Dec. 422; Bitting v. Ten Eyck, 82 Ind. 424, 42 Am. Rep. 505; Adams v. Bicknell, 126 Ind. 211, 25 N. E. Rep. 804, and cases cited; Welch v. Boston & P. R. Co., 14 R. I. 609; Boogher v. Hough, 99 Mo. 183, 12 S. W. Rep. 524; Olson v. Neal, 63 Iowa, 216, 18 N. W. Rep. 863; Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., 120 U. S. 141, 7 Sup. Ct. Rep. 452.

[2] Nehr v. Dobbs, 47 Neb. 863, 66 N. W. Rep. 864.

[3] Taylor v. Williams, 2 B. & Ad. 845; Cotton v. James, 1 id. 128; Vinal v. Core, 18 W. Va. 1, 41.

ferred.[1] Efforts made by the defendant to have the proceedings against the plaintiff dismissed cannot be proven in mitigation of damages where the latter has been arrested and imprisoned.[2] But evidence concerning offers by the complainant, made pending the criminal proceedings, looking to the withdrawal of the charge is competent upon the question of malice, of the authority of the person making them and as part of the *res gestæ* of the criminal prosecution.[3]

Where the action was for the abuse of legal process by making an excessive attachment, malice was properly defined as acting in bad faith, and that if the defendant, with the design to injure or oppress, by fixing an excessive *ad damnum*, went beyond what he believed to be necessary and proper to secure the payment of the judgment which he might recover, by forcing payment of a sum larger than would otherwise be paid, he was not acting in good faith, and that that would warrant an inference that he was acting maliciously. The same test was applicable to the conduct of the defendant's attorney who directed the making of the excessive attachment.[4]

§ 1240. Same subject. If it appears that there was probable cause, that is a complete defense.[5] But if the evidence tending to show it fails in that object, to the extent that it affords ground for belief that the party prosecuted was guilty, it tends to rebut malice and may mitigate exemplary damages or those which might be awarded solely because of malice.[6] Facts within defendant's knowledge, and facts communicated to him by others, and even rumors or reports in the neighborhood, have been allowed to be proved.[7] Proof that the de-

[1] McClafferty v. Philp, 151 Pa. 86, 24 Atl. Rep. 1042.

[2] Owens v. Owens, 81 Md. 518, 32 Atl. Rep. 247.

[3] Scott v. Dennett Surpassing Coffee Co., 51 App. Div. 321, 64 N. Y. Supp. 1016.

[4] Zinn v. Rice, 161 Mass. 571, 37 N. E. Rep. 747.

[5] Staunton v. Goshorn, 36 C. C. A. 75, 94 Fed. Rep. 52.

[6] Bacon v. Towne, 4 Cush. 217; Bell v. Pearcy, 5 Ired. 83.

[7] Pullen v. Glidden, 68 Me. 562; Carl v. Ayers, 53 N. Y. 14; Bacon v. Towne, *supra;* Carpenter v. Sheldon, 5 Sandf. 77; Hitchcock v. North, 5 Rob. (La.) 328, 39 Am. Dec. 540; Lamb v. Gulland, 44 Cal. 609; Thomas v. Russell, 9 Ex. 764; Lister v. Perryman, L. R. 5 Ex. 365; Heyne v. Blair, 62 N. Y. 19; Miller v. Milligan, 48 Barb. 30; Foshay v. Ferguson, 2 Denio, 617; Gallaway v. Burr, 32 Mich. 332; Wyatt v. White, 6 H. & N. 371; Vinal v. Core, 18 W. Va. 1; Hicks v. Faulkner, 8 Q. B. Div. 167; Warren v. Flood, 72 Mo. App.

fendant acted upon the advice of counsel learned in the law, or, as it is sometimes expressed, a reputable practicing attorney,[1] who is disinterested and unbiased,[2] given after a full and fair statement of all the known facts, and those within his belief,[3] will generally be a full defense, especially if the advice was given by an attorney general, county attorney or other prosecuting officer in his official capacity.[4] This rule applies

199; Staunton v. Goshorn, 94 Fed. Rep. 52, 36 C. C. A. 75; Le Clear v. Perkins, 103 Mich. 131, 61 N. W. Rep. 357, 26 L. R. A. 627; Waters v. West Chicago Street R. Co., 101 Ill. App. 265.

[1] O'Neal v. McKinna, 116 Ala. 606, 620, 22 So. Rep. 905; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. Rep. 650.

[2] White v. Carr, 71 Me. 555, 36 Am. Rep. 533.

[3] Black v. Buckingham, 174 Mass. 102, 54 N. E. Rep. 494.

[4] Ravenga v. Mackintosh, 2 B. & C. 693; Stanton v. Hart, 27 Mich. 539; Wicker v. Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75; Laird v. Taylor, 66 Barb. 143; Pullen v. Glidden, 68 Me. 566; Paddock v. Watts, 116 Ind. 146, 18 N. E. Rep. 518, 9 Am. St. 832; Schippel v. Norton, 38 Kan. 567, 16 Pac. Rep. 804; Dunlap v. New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 Pac. Rep. 29; Smith v. Austin, 49 Mich. 286, 13 N. W. Rep. 593; Yocum v. Polly, 1 B. Mon. 358, 36 Am. Dec. 583; Huntington v. Gault, 81 Mich. 144, 45 N. W. Rep. 970; Allen v. Codman, 139 Mass. 136, 29 N. E. Rep. 537; Stewart v. Sonneborn, 98 U. S. 187; Bernar v. Dunlap, 94 Pa. 329; Cooney v. Chase, 81 Mich. 203, 45 N. W. Rep. 833; Eastman v. Keasor, 44 N. H. 518; Ash v. Marlow, 20 Ohio, 119; Holliday v. Holliday, 123 Cal. 26, 36, 55 Pac. Rep. 703; Williams v. Casebeer, 126 Cal. 77, 58 Pac. Rep. 380; Whitehead v. Jessup, 2 Colo. App, 76, 29 Pac. Rep. 916; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. Rep. 913; Parker v. Parker, 102 Iowa, 500, 71 N. W. Rep. 421; Warren v. Flood, 72 Mo. App. 199; Peterson v. Reisdorph, 49 Neb. 529, 68 N. W. Rep. 943; Bell v. Atlantic R. Co., 58 N. J. L. 227, 33 Atl. Rep. 211; Magowan v. Rickey, 64 N. J. L. 402, 45 Atl. Rep. 804; Staunton v. Goshorn, 94 Fed. Rep. 52, 36 C. C. A. 75; Sanders v. Palmer, 55 Fed. Rep. 217, 5 C. C. A. 77; Forbes v. Hagman, 75 Va. 168; Jordan v. Alabama, etc. R. Co., 81 Ala. 227, 8 So. Rep. 191; Perry v. Sulier, 92 Mich. 72, 52 N. W. Rep. 801; Le Clear v. Perkins, 103 Mich. 131, 26 L. R. A. 627, 61 N. W. Rep. 357; Poupard v. Dumas, 105 Mich. 326, 63 N. W. Rep. 301; Kompass v. Light, 122 Mich. 86, 80 N. W. Rep. 1008; McClafferty v. Philp, 151 Pa. 86, 24 Atl. Rep. 1042; Beihofer v. Loeffert, 159 Pa. 374, 28 Atl. Rep. 216; Billingsley v. Maas, 93 Wis. 176, 181, 67 N. W. Rep. 49; Sylva v. Cockett, 12 Hawaiia, 133; Small v. McGovern, — Wis. —, 94 N. W. Rep. 651. See Vinal v. Core, 18 W. Va. 1.

If an attorney's compensation depends upon the number of prosecutions instituted, his advice is not a defense. McGarry v. Missouri Pacific R. Co., 36 Mo. App. 340. Neither is it so when client and attorney are in complicity in instituting a groundless prosecution. Watt v. Corey, 76 Me. 87; Hamilton v. Smith, 39 Mich. 222.

Advice given upon a misrepresentation of the circumstances is not available as a defense (Decoux v. Lieux, 33 La. Ann. 392), or upon a partial statement of the facts known

to all persons in the like circumstances, including lawyers who, for themselves or as agents for others, are personally concerned in bringing or defending actions.[1] The question of the good faith of counsel in giving the advice is not an element in the problem.[2] In some states the advice of counsel and action thereon in good faith is provable merely to rebut malice and want of probable cause, and is not an absolute justification of the prosecution.[3] It may be considered in determining the

to the defendant. Roy v. Goings, 112 Ill. 656; Cointement v. Cropper, 41 La. Ann. 392, 6 So. Rep. 127; Watt v. Corey, 76 Me. 87; Peterson v. Toner, 80 Mich. 350, 45 N. W. Rep. 346.

Not only must all known facts be fully disclosed, but also all such facts and information as in the exercise of reasonable care and prudence, with due regard to the rights of the party to be proceeded against, the defendant ought to have obtained. Watt v. Corey, 76 Me. 87; Hyde v. Greuch, 62 Md. 577.

The advice of counsel is more important on the question of malice than on that of probable cause, and is not conclusive as to the former. Brewer v. Jacobs, 22 Fed. Rep. 217.

If the jury find that the defendant acted maliciously and without probable cause, the fact that he was advised to institute a suit will not exempt him from liability. Jacobs v. Crum, 62 Tex. 401; Gulf, etc. R. Co. v. James, 73 id. 12, 10 S. W. Rep. 744, 15 Am. St. 743; Glascock v. Bridges, 15 La. Ann. 672; Roy v. Goings, 112 Ill. 656.

In determining the effect to be given to the advice of counsel the jury may consider whether the defendant paid for it or not. Cooney v. Chase, 81 Mich. 203, 41 N. W. Rep. 833.

If the counsel advised with was interested, his advice is not a protection. White v. Carr, 71 Me. 555, 36 Am. Rep. 353.

It must appear that the counsel was such as the defendant had no reason to suspect of bias or prejudice, and in whose judgment he was justified in reposing confidence. Smith v. King, 62 Conn. 515, 26 Atl. Rep. 1059; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. Rep. 969.

A defendant cannot shelter himself by his own advice to himself, though he be a lawyer. Epstein v. Berkowsky, 64 Ill. App. 498.

The client must give the attorney all the facts in his possession though the attorney made an investigation himself, but without discovering some facts of which the client had knowledge. Hurlbut v. Hardenbrook, 85 Iowa. 606, 52 N. W. Rep. 510; Koster v. Seney, 99 Iowa, 584, 68 N. W. Rep. 824.

[1] Terre Haute & I. R. Co. v. Mason, 148 Ind. 578, 589, 46 N. E. Rep. 332.

[2] Sandell v. Sherman, 107 Cal. 397, 40 Pac. Rep. 493; Seabridge v. McAdam, 119 Cal. 460, 51 Pac. Rep. 691. But compare Smith v. King, 62 Conn. 515, 26 Atl. Rep. 1059.

[3] Atkinson v. Van Cleave, 25 Ind. App. 508, 57 N. E. Rep. 731 (citing Lytton v. Baird, 95 Ind. 349); Paddock v. Watts, 116 Ind. 146, 18 N. E. Rep. 518, 9 Am. St. 832; Brown v. McBride, 24 N. Y. Misc. 235, 52 N. Y. Supp. 620: Sebastian v. Cheney, 86 Tex. 497, 501, 25 S. W. Rep. 691, and local cases cited; Smith v. Eastern Building & Loan Ass'n, 116 N. C. 73, 21 S. E. Rep. 33; Thurber v. Same, 116 N. C. 75, 21 S. E. Rep. 193; Hicks v. Brantley, 102 Ga. 264, 270, 29 S. E.

absence of malice and the existence of probable cause.[1] In Texas the general rule, as previously stated, applies when the advice is given by the proper prosecuting officer,[2] and so in Georgia.[3] If the facts clearly make the question of probable cause one of law advice of counsel is of no effect.[4] The cases all agree that the legal advice which constitutes a defense must rest on an honest and full presentation to counsel of all facts within the knowledge of the prosecutor, or which he has reasonable ground for believing he is able to prove. An incomplete and unfair statement warrants the inference that the advice was sought as a cover for the prosecution.[5] It is also essential that such advice be acted upon in good faith.[6] Advice from persons not learned in the law will not be a full defense.[7] There is not entire agreement as to the effect to be given the advice of magistrates or police officers. In some states such advice may be proven to show the circumstances under which the prosecution was instituted and to mitigate damages.[8] But gen-

Rep. 459; Mauldin v. Ball, 104 Tenn. 597, 58 S. W. Rep. 248; Kendrick v. Cypert, 10 Humph. 291; Morgan v. Duffy, 94 Tenn. 686, 30 S. W. Rep. 735.

[1] Hurlbut v. Boaz, 4 Tex. Civ. App. 371, 23 S. W. Rep. 446; Scott Grocer Co. v. Kelly, 14 Tex. Civ. App. 136, 141, 36 S. W. Rep. 140; Bell v. Atlantic City R. Co., 202 Pa. 178, 51 Atl. Rep. 600.

[2] Sebastian v. Cheney, *supra;* Lenoir v. Marlin, 10 Tex. Civ. App. 376, 30 S. W. Rep. 566.

[3] Hicks v. Brantley, *supra.*

[4] Hazzard v. Flury, 120 N. Y. 223, 24 N. E. Rep. 194. Compare Horsley v. Style, 9 T. L. Rep. 605.

[5] Barhight v. Tammany, 158 Pa. 545, 551, 28 Atl. Rep. 135, 38 Am. St. 853; Scrivani v. Dondero, 128 Cal. 31, 60 Pac. Rep. 463; Parker v. Parker, 102 Iowa, 500, 71 N. W. Rep. 421; Torsch v. Dell, 88 Md. 459, 41 Atl. Rep. 903; Jackson v. Bell, 5 S. D. 257, 265, 58 N. W. Rep. 671; Wuest v. American Tobacco Co., 10 S. D. 394, 73 N. W. Rep. 903; Jones v. Morris, 97 Va. 43, 33 S. E. Rep. 377; Miles v. Walker, — Neb. —, 92 N. W. Rep. 1014; Jensen v. Halstead, 61 Neb. 249, 85 N. W. Rep. 78; Hess v. Oregon Baking Co., 31 Ore. 503, 49 Pac. Rep. 803. See § 1239; Replogle v. Frothingham, 16 Pa. Super. Ct. 374.

[6] Williams v. Casebeer, 126 Cal. 77, 58 Pac. Rep. 380; Biddle v. Jenkins, 61 Neb. 400 85 N. W. Rep. 392; Merchant v. Pielke, 10 N. D. 48, 84 N. W. Rep. 574; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. Rep. 913; Connery v. Manning, 163 Mass. 44, 39 N. E. Rep. 558; O'Neal v. McKinna, 116 Ala. 606, 621, 22 So. Rep. 905; Wuest v. American Tobacco Co., 10 S. D. 394, 73 N. W. Rep. 903; Jones v. Morris, 97 Va. 43, 33 S. E. Rep. 377; Kehl v. Hope Oil Mill & C. Co., 77 Miss. 762, 27 So. Rep. 641.

[7] Stanton v. Hart, 27 Mich. 539; Burgett v. Burgett, 43 Ind. 78; Murphy v. Larson, 77 Ill. 172; Beal v. Robeson, 8 Ired. 276.

[8] Hirsch v. Feeney, 83 Ill. 550; White v. Tucker, 16 Ohio St. 468; Florence Oil & Refining Co. v. Huff,

erally the advice of magistrates who are not counselors at law has been held no protection.[1] In Massachusetts and New York the advice of the magistrate who received the complaint, he being a member of the bar, is admissible upon the question of probable cause.[2] In England, if under the statute conferring jurisdiction upon the magistrate, he is required before granting the warrant to try the question of probable cause, the complainant is not liable to an action.[3] In some states the advice of a justice of the peace is a protection, regardless of his being a member of the legal profession, and without reference to statutory provisions.[4] In Alabama the advice of a magistrate, though he be a lawyer, is not a defense.[5] If a "person discloses fairly and truthfully to an officer whose duty it is to detect crime, all matters within his knowledge which, as a man of ordinary intelligence, he is bound to suppose would have a material bearing upon the question of the innocence or guilt of the person suspected, and leaves it to the officer to act entirely upon his own judgment and responsibility as a public officer, as to whether or not there shall be a criminal prosecution, and does no more, he cannot be held answerable in an action for malicious prosecution, even if the officer comes to the wrong conclusion and prosecutes when he ought not to do so."[6]

14 Colo. App. 281, 59 Pac. Rep. 624; Wilkinson v. Arnold, 11 Ind. 45; Mauldin v. Ball, 104 Tenn. 597, 58 S. W. Rep. 248.

[1] Olmstead v. Partridge, 16 Gray, 381; Straus v. Young, 36 Md. 246; Coleman v. Henrich, 2 Mackey, 189; Brobst v. Ruff, 100 Pa. 91, 45 Am. Rep. 358; Gee v. Culver, 12 Ore. 228; Cooney v. Chase, 81 Mich. 203, 45 N. W. Rep. 833; Gilbertson v. Fuller, 40 Minn. 413, 42 N. W. Rep. 203; McLeod v. McLeod, 73 Ala. 42, 46; Finn v. Frink, 84 Me. 261, 24 Atl. Rep. 851, 30 Am. St. 348; Lueck v. Heisler, 87 Wis. 644, 58 N. W. Rep. 1101; Sutton v. McConnell, 46 Wis. 269, 50 N. W. Rep. 414; Beihofer v. Loeffert, 159 Pa. 365, 28 Atl. Rep. 217, 159 Pa. 374, 28 Atl. Rep. 216; Necker v. Bates, — Iowa, —, 92 N. W. Rep. 667.

In Sisk v. Hurst, 1 W. Va. 53, the advice of a magistrate was held to protect, but the report does not show whether he was a member of the bar.

[2] Monaghan v. Cox, 155 Mass. 487, 30 N. E. Rep. 467, 31 Am. St. 555; Turner v. Dinnegar, 20 Hun, 465.

[3] Hope v. Evered, 17 Q. B. Div. 338; Lea v. Charrington, 23 id. 45.

[4] Ball v. Rawles, 93 Cal. 222, 235, 28 Pac. Rep. 937, 27 Am. St. 174; Hahn v. Schmidt, 64 Cal. 284, 30 Pac. Rep. 818; Newman v. Davis, 58 Iowa, 447, 12 N. W. Rep. 852 (it seems); Williams v. Casebeer, 126 Cal. 77, 88, 58 Pac. Rep. 380.

[5] Marks v. Hastings, 101 Ala. 165, 13 So. Rep. 297.

[6] Burnham v. Collateral Loan Co., 179 Mass. 268, 60 N. E. Rep. 617.

According to the better authorities the defendant may prove the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause and in mitigation of damages. The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression if they tended to throw a [709] charge of guilt upon a man of good reputation.[1] The fact that the plaintiff might, in the criminal proceeding against him, have shortened his imprisonment by availing himself of his right to a preliminary examination need not be considered as a ground for reducing damages unless there is affirmative proof [710] that his motive in waiving such examination and exposing himself to continued imprisonment was to enhance damages.[2] Though the plaintiff claims damages only for the ignominy and disgrace of the prosecution, the defendant may show that he was not actually arrested but voluntarily surrendered himself. Less of ignominy and disgrace was incident to the prosecution in the latter case than would have attended it in the former.[3]

[1] Rosenkrans v. Barker, 115 Ill. 333, 3 N. E. Rep. 93, 56 Am. Rep. 169, quoting the first sentence of the text; Gregory v. Chambers, 78 Mo. 294; Martin v. Hardesty, 27 Ala. 458, 62 Am. Dec. 773; Pullen v. Glidden, 68 Me. 563; Barron v. Mason, 31 Vt. 201; Bacon v. Towne, 4 Cush. 217, 240; Rodriguez v. Tadmire, 2 Esp. 721; Fitzgibbon v. Brown, 43 Me. 169; Israel v. Brooks, 23 Ill. 575; Hlubek v. Pinske, 84 Minn. 363, 87 N. W. Rep. 939; McIntire v. Levering, 148 Mass. 546, 20 N. E. Rep. 191, 2 L. R. A. 517, 12 Am. St. 594; Davis v. Seeley, 91 Iowa. 583, 60 N. W. Rep. 183, 51 Am. St. 356. See Blizzard v. Hays, 46 Ind. 166; Oliver v. Pate, 43 id. 132; Scott v. Fletcher, 1 Overt. 488; Bostick v. Rutherford, 4 Hawks. 83.

It is not competent to prove acts of the plaintiff done after his release from arrest. Black v. Buckingham, 174 Mass. 102, 54 N. E. Rep. 494.

The defendant cannot give evidence of another offense, unless there is some clear connection between that and the one with which the plaintiff was charged. A lapse of ten years is too remote to justify proof of another offense of the same nature. Williams v. Casebeer, 126 Cal. 77, 58 Pac. Rep. 380.

Testimony as to the bad reputation of the plaintiff in respect to the matter charged in the original proceeding is admissible if pleaded, otherwise not. Scheer v. Keown, 34 Wis. 349. And so as to evidence of a general rumor to the effect that plaintiff was guilty of the offense for which he was prosecuted. Spear v. Hiles, 67 Wis. 350, 30 N. W. Rep. 506.

If the plaintiff is a minor and has been maliciously informed against for threatening a breach of the peace the general bad reputation of his mother as a peaceable and orderly person is not provable to show good faith. Hyde v. Greuch, 62 Md. 577.

[2] King v. Colvin, 11 R. I. 582.

[3] Chatfield v. Bunnell, 69 Conn. 511, 519, 37 Atl. Rep. 1074.

CHAPTER XXXVI.

PERSONAL INJURY.*

§ 1241. Elements of damage.
1242–1245. Physical and mental pain.
1246. Loss of time, injury to business, diminished capacity.
1247. Same subject; pleading.
1248. Same subject; evidence.
1249. Same subject; measure of recovery.
1250. Expenses for surgical and medical aid, etc.
1251. But one action maintainable; prospective damages.
1252. Husband's and parent's action.
1253. Exemplary damages.
1254. Pecuniary and other circumstances of the parties.
1255. Evidence in mitigation.
1256. Province of the jury, and instructions thereto.
1257, 1258. False imprisonment.

[711] **§ 1241. Elements of damage.** The law aims to afford full redress for personal injuries as well as for all others. The sufferer is entitled to compensation from the person by whose fault the injury occurred for the pain resulting from the corporal hurt so long as it produces pain; for mental suffering naturally resulting from the injury or wrong, and, according to the better opinion, whether such suffering be apprehension and anxiety from the depressing effect of the wrong or induced by its alarming character; for wounded sensibility or affection, and for sense of wrong and insult by reason of the malice of the wrong-doer and the incidents of the infliction;[1] for impaired health and working capacity, mutilation or disfigurement,[2]— a consideration of especial importance in the

[1] Thomas v. Gates, 126 Cal. 1, 58 Pac. Rep. 315.

[2] Newbury v. Getchel & M. Lumber & Manuf. Co., 100 Iowa, 441, 457, 69 N. W. Rep. 743, 62 Am. St. 582; Rosenkranz v. Lindell R. Co., 108 Mo. 9, 15, 18 S. W. Rep. 890, 32 Am. St. 588; Bennett v. Brooklyn Heights R. Co., 1 App. Div. 205, 37 N. Y. Supp. 447; Smith v. Pittsburgh & W. R. Co., 90 Fed. Rep. 783; Railway Co. v. Dobbins, 60 Ark. 481, 30 S. W. Rep. 887; St. Louis, etc. R. Co. v. Waren, 65 Ark. 619, 627, 48 S. W. Rep. 222; Rockwell v. Eldred, 7 Pa. Super. Ct. 95; Chicago & M. E. R. Co. v. Krempel, 103 Ill. App. 1; Reliance Textile & Dye Works v. Mitchell, 71 S. W. Rep.

* This subject received some attention under the head of Carriers of Passengers, §§ 938–953. See also §§ 150, 151.

case of young women if it is visible,— for the expenses of nursing and care, and for all other detrimental effects which naturally and proximately ensue.[1] "It is to be assumed that every physical endowment, function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them. And to the extent to which any function is destroyed, or its discharge rendered painful or perilous by the wrongful infliction of personal injury, is the party complaining entitled to damages. We can, in other words, conceive of no physical injury, wrongfully inflicted, whether entailing pain only, or disfigurement, or incapacity, relative or absolute, to perform any of the functions of life which may not be made the predicate for compensation in damages."[2]

The right to recover for a personal injury is not affected by the motive with which the injury was inflicted; the motive is only material when punitive damages are sought.[3] There may be a recovery of compensatory damages though the injury was inflicted in a fight mutually consented to in anger by the parties.[4] If the condition of a person injured is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury, the consequent disability to earn a living, and the bodily and mental suffering which will result. But damages cannot be recovered for the loss or shortening of life. "The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the

425 (Ky.); Giffen v. Lewiston, 55 Pac. Rep. 545 (Idaho).

[1] Ford v. Charles Warner Co., 1 Marvel, 88, 37 Atl. Rep. 39; Stewart v. Philadelphia, etc. R. Co., 8 Houst. 450, 17 Atl. Rep. 639; Washington & G. R. Co. v. Harmon, 147 U. S. 571, 573, 584, 13 Sup. Ct. Rep. 558.

[2] Alabama, etc. R. Co. v. Hill, 93 Ala. 514, 519, 9 So. Rep. 722, 30 Am. St. 65, per McClellan, J., in a case in which the injury to an unmarried woman rendered child-bearing perilous to life. See The Oriflamme, 3 Sawyer, 397, 404, in which Deady, J., allowed $500 as compensation for the permanent disfigurement of the female plaintiff's face.

In Bennett v. Brooklyn Heights R. Co., 1 App. Div. 205, 37 N. Y. Supp. 447, a verdict for $6,000 was sustained, the face of a girl aged eight years being permanently disfigured, her collar bone and four ribs broken, and her pelvis injured.

[3] Kirton v. North Chicago Street R. Co., 91 Ill. App. 554.

[4] Shay v. Thompson, 59 Wis. 540, 18 N. W. Rep. 473, 48 Am. Rep. 538; Grotton v. Glidden, 84 Me. 589, 24 Atl. Rep. 1008, 30 Am. St. 413, and cases cited.

loss or shortening of his own life."[1] Under a statute providing for the survival of actions for negligent injury to the person if the person injured survives the injury an appreciable length of time, it is proper in estimating the damages to consider "the earning ability of the injured person, and the length of time he probably would have lived had he not been injured, and the loss he sustained by reason of being deprived, by such injuries, of the ability to labor and earn money during the time he probably could have lived had he not been injured." The administrator may also recover for the pain endured by the decedent intermediate his injury and death.[2]

§ 1242. Physical and mental pain. An injury to the person necessarily causes pain; it is a direct effect; and whether the pain is only momentary or continues for a long period, it is an immediate consequence. In the absence of any supervening fault of the injured party, having the effect to retard or prevent a cure, he is entitled to compensation from the person who wrongfully inflicted the injury for all the pain suffered from the moment of the injury to the time of its complete cure. Money is an inadequate recompense for pain; but as the law can afford no other redress it aids the sufferer to obtain this in such measure as a jury, dispassionately considering all [712] the circumstances, will allow.[3] Whether the injury is

[1] Richmond Gas Co. v. Baker, 146 Ind. 600, 609, 45 N. E. Rep. 1049, 36 L. R. A. 683.

[2] Kyes v. Valley Tel. Co., —— Mich. ——, 93 N. W. Rep. 623; Oliver v. Houghton County Street R. Co., —— Mich. ——, 96 N. W. Rep. 434.

[3] Barlow v. Lowder, 35 Ark. 492; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Chicago & E. R. Co. v. Holland, 122 Ill. 461, 13 N. E. Rep. 145; Wall v. Livezay, 6 Colo. 465; Winkler v. St. Louis, etc. R. Co., 21 Mo. App. 99; Indiana Car Co. v. Parker, 100 Ind. 181; Central Passenger R. Co. v. Kuhn, 86 Ky. 578, 6 S. W. Rep. 441, 9 Am. St. 309; Phillips v. London, etc. R Co., 42 L. T. Rep. 6; Wallace v. Western North Carolina R. Co., 104 N. C. 442, 10 S. E. Rep. 552; Houston, etc. R. Co. v. Boehm, 57 Tex. 152; Verrill v. Minot, 31 Me. 299; Pennsylvania R. Co. v. Allen, 53 Pa. 276; Slater v. Sherman, 5 Bush, 206; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Ransom v. New York, etc. R. Co., 15 N. Y. 415; Chicago v. Langlass, 66 Ill. 361; Scott v. Hamilton, 71 id. 85; McLaughlin v. Corry, 77 Pa. 109, 18 Am. Rep. 432; Lucas v. Flinn, 35 Iowa, 9; Oliver v. North Pacific Transportation Co., 3 Ore. 84; Tefft v. Wilcox, 6 Kan. 46; Welch v. Ware, 32 Mich. 77; Beardsley v. Swann, 4 McLean, 333; Pierce v. Millay, 44 Ill. 189; Johnson v. Wells, etc. Co., 6 Nev. 225, 3 Am. Rep. 245; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 217, 9 So. Rep. 363, citing the text; Morgan v. South-

the result of negligence or direct personal violence, the resulting pain is an element of damage to be compensated; in other words, it is an element of compensatory damages.[1] The right to recover for suffering is not affected by the disposition the

ern Pacific Co., 95 Cal. 501, 30 Pac. Rep. 601, 17 L. R. A. 71; Greer v. Louisville & N. R. Co., 94 Ky. 169, 177, 21 S. W. Rep. 649, 42 Am. St. 345; Railway Co. v. Dobbins, 60 Ark. 481, 30 S. W. Rep. 887; St. Louis, etc. R. Co. v. Waren, 65 Ark. 619, 48 S. W. Rep. 223; Sandwich v. Dolan, 141 Ill. 430, 31 N. E. Rep. 416; Central R. Co. v. Serfass, 153 Ill. 379, 39 N. E. Rep. 119; Standard Oil Co. v. Tierney, 92 Ky. 367, 17 S. W. Rep. 1025, 36 Am. St. 595, 14 L. R. A. 677; Gerdes v. Christopher & S. Architectural Iron & F. Co., 124 Mo. 347, 25 S. W. Rep. 557; Fullerton v. Fordyce, 144 Mo. 519, 532, 44 S. W. Rep. 1053; American Water Works Co. v. Dougherty, 37 Neb. 373, 377, 55 N. W. Rep. 1051; Baker v. Irish, 172 Pa. 528, 33 Atl. Rep. 558; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. Rep. 145; Alabama, etc. R. Co. v. Bailey, 112 Ala. 167, 177, 20 So. Rep. 313; Same v. Davis, 119 Ala. 572, 24 So. Rep. 862; Musick v. Latrobe, 184 Pa. 375, 39 Atl. Rep. 226; Bamford v. Pittsburg & B. Traction Co., 194 Pa. 17, 44 Atl. Rep. 1068; Washington & G. R. Co. v. Patterson, 9 D. C. App. Cas. 423, 436; Alabama, etc. R. Co. v. Burgess, 114 Ala. 587, 22 So. Rep. 169; West Chicago Street R. Co. v. Foster, 175 Ill. 396, 51 N. E. Rep. 690; Rodney v. St. Louis South Western R. Co., 127 Mo. 676, 28 S. W. Rep. 887; Hamilton v. Great Falls Street R. Co., 17 Mont. 334, 42 Pac. Rep. 860.

It is not often that a case is found in which the suffering of the plaintiff constitutes the sole ground of damage. There are a few cases which approximate to this. In Merrill v. St. Louis, 12 Mo. App. 466, the injury consisted of a sprained ankle. A physician prescribed for it once, and the plaintiff treated it herself for six weeks, after which time she was treated gratuitously at a hospital. No expenditures were proven. The plaintiff was confined to her room for several weeks, and for four months was unable to attend to her boarding-house. There was no evidence that any pecuniary loss was sustained; "though," said Judge Thompson, "we suppose from all the circumstances a jury might fairly infer that she sustained some loss." The court looked upon an

[1] Id.; Richmond & D. R. Co. v. Weems, 97 Ala. 270, 12 So. Rep. 186; Mueller v. Kuhn, 59 Ill. App. 353.

If a serious physical injury has been sustained there need be no verbal proof of the resulting pain in order that it may be an element of damages. Chicago, etc. R. Co. v. Warner, 108 Ill. 538; Brown v. Hannibal, etc. R. Co., 99 Mo. 310, 12 S. W. Rep. 655.

In the case of a broken limb the fact may be shown that it was necessary, either because of the nature of the hurt or the condition of the patient, to reset it at different times, if it was proper to do so under the circumstances, and the original treatment was skilful. Goshen v. England, 119 Ind. 368, 21 N. E. Rep. 977, 5 L. R. A. 253.

Evidence that the plaintiff suffered, and would always suffer, great pain, furnishes sufficient *data* for the assessment of damages. Alabama, etc. R. Co. v. Bailey, 112 Ala. 167, 20 So. Rep. 313.

plaintiff made of his earnings;[1] nor by the fact that they were as much after as before the injury.[2] Pain is not to be regarded as an independent item of damages to be compensated by a sum of money that may be considered as a pecuniary

award of $2,000 with distrust, but affirmed the judgment, saying: "We have no scales with which to estimate the value of this suffering, and consequently we cannot say that the jury, in awarding the sum named, have awarded an excessive sum, much less that they have acted from passion or prejudice." See Dimmitt v. Hannibal, etc. R. Co., 40 Mo. App. 654.

In Jennings v. Van Schaick, 13 Daly, 7, a case not very materially different from the above, a verdict for $10,000 was set aside as excessive.

In Harold v. New York, etc. R. Co., 13 Daly, 378, external lacerations and internal injuries were received by a woman aged thirty-five whose earnings were $30 a month. She was confined to her bed several months, obliged to have medical services for months thereafter, and there was a strong probability that she would suffer permanently. On the first trial the verdict was for $4,500; on the second, for $8,000. This was sustained.

The injury to a married woman of forty-three was to the sciatic nerve, which produced inflammation of a uterian ligament, accompanied by obstinate constipation, nervous prostration and sexual difficulty, all resulting in suffering when she walked. A verdict for $10,000 was reduced by the court to $4,000. Lockwood v. Twenty-third Street R. Co., 15 Daly, 374, 7 N. Y. Supp. 663.

A verdict for $10,000 for a broken leg, dislocated arm, injured back and shoulder, resulting in disability to work for a year, and which caused great suffering, was sustained in favor of a woman. Brown v. Sullivan, 71 Tex. 470, 10 S. W. Rep. 288. But a federal court in Louisiana, in determining the extent of the plaintiff's lien against the receiver of the railroad company which caused the injury, allowed only $5,000. Missouri Pacific R. Co. v. Texas Pacific R. Co., 41 Fed. Rep. 311.

Where a passenger's injury consisted of the fracture of the small bone of the leg at the ankle, in consequence of which he was laid up for about eight weeks, and there was no evidence that he would have future serious trouble as a consequence, a verdict of $4,000 was held excessive under pleadings which claimed compensation only for the pain and suffering. South Covington & C. Street R. Co. v. Ware, 84 Ky. 267, 1 S. W. Rep. 493.

In The William Branfoot, 48 Fed. Rep. 914, a court of admiralty allowed $500 to a seaman one of whose legs was amputated below the knee as the result of a fracture as compensation for his suffering.

Where a man aged sixty-two had three ribs broken, his side bruised, and was for a time rendered insensible, but had so far recovered at the time of the trial as not to be a great sufferer, though his testimony showed impairment of his appetite and general health, a verdict for $3,750 was sustained. Missouri Pacific R. Co. v. Aiken, 71 Tex. 373, 9 S. W. Rep. 437.

[1] Louisville & N. R. Co. v. Woods, 115 Ala. 527, 22 So. Rep. 33.

[2] Arnesen v. Brooklyn City R. Co., 9 N. Y. Misc. 270, 29 N. Y. Supp. 748.

equivalent. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for, or made because of, the suffering consequent upon the injury.[1] Where the bill of particulars in an action by husband and wife for injury to the latter claimed only for medical attendance, medicines and supplies and nursing, there could not be a recovery for the suffering endured.[2]

§ 1243. Same subject. The jury may consider the case with all its facts, and take into account, for the purpose of awarding compensation, not only the physical pain, but also such mental suffering as they are satisfied must have been experienced as the natural result of the wrong done or injury inflicted.[3] Such suffering is an element of damages in favor of a young child whose physical injuries were very serious and

Where there was a fracture of that portion of the pelvis called the crest of the *ilium*, and the plaintiff, a woman, suffered considerable pain and was confined to bed for ten months, and had not fully recovered at the time of the trial, more than three years after the accident, a verdict for $4,000 was sustained. Heucke v. Milwaukee City R. Co., 69 Wis. 401, 34 N. W. Rep. 243.

Where the injury resulted in the loss of three fingers of the left hand of a man employed at $1.50 per day, and his hand did not get well until eight months thereafter, and it was necessary to probe the hand and remove bone, some of which came out at the wrist, which was stiff at the time of the trial, a verdict for $6,000 was sustained. Murtaugh v. New York, etc. R. Co., 49 Hun, 456, 3 N. Y. Supp. 483.

In Louisville & N. R. Co. v. Earl's Adm'x, 94 Ky. 368, 22 S. W. Rep. 607, a verdict for $4,000 for the pain, anguish, loss of time, etc., suffered by the plaintiff's intestate during the ten days he lived after the accident, was sustained.

[1] Goodhart v. Pennsylvania R. Co., 177 Pa. 115, 35 Atl. Rep. 191, 55 Am. St. 705.

[2] Howells v. North American Transportation & T. Co., 24 Wash. 689, 64 Pac. Rep. 786.

[3] Wolf v. Trinkle, 103 Ind. 355, 3 N. E. Rep. 110; Root v. Sturdivant, 70 Iowa, 55, 29 N. W. Rep. 802; Kendall v. Albia, 73 Iowa, 241, 34 N. W. Rep. 833; Salina v. Trosper, 27 Kan. 544, 564; Central Passenger R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. 309, 6 S. W. Rep. 441; Sloan v. Edwards, 61 Md. 89; Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589, 24 N. W. Rep. 675; Winkler v. St. Louis, etc. R. Co., 21 Mo. App. 98; Randolph v. Hannibal, etc. R. Co., 18 id. 609; Wallace v. Western North Carolina R. Co., 104 N. C. 442, 10 S. E. Rep. 552; Scott v. Montgomery, 95 Pa. 444; Robinson v. Marino, 3 Wash. 434, 28 Pac. Rep. 752, 28 Am. St. 50; Seger v. Barkhamsted, 22 Conn. 290; Masters v. Warren, 27 id. 293; Lawrence v. Housatonic R. Co., 29 id. 390; Fenelon v. Butts, 53 Wis. 344, 10 N. W. Rep. 501; Craker v. Chicago, etc. R. Co., 36 Wis. 657, 17 Am. Rep. 504; Mason v. Ellsworth, 32 Me. 271; Prentiss v. Shaw, 56 id. 427, 96 Am.

permanent.[1] When bodily pain is caused mental suffering follows as a consequence, especially when the former is so severe as to create apprehension and anxiety,[2] as where one is con-

Dec. 425; Wadsworth v. Treat, 43 Me. 163; Goddard v. Grand Trunk R. Co., 57 id. 202; Wyman v. Leavitt, 71 id. 229; Giblin v. McIntyre, 2 Utah, 384; McIntyre v. Giblin, book 25, p. 572, Co-op. ed. U. S. Sup. Ct.; Hanson v. Fowle, 1 Sawyer, 539, 546; Fairchild v. California Stage Co., 13 Cal. 599; Smith v. Holcomb, 99 Mass. 552; Canning v. Williamstown, 1 Cush. 451; Wright v. Compton, 53 Ind. 337; West v. Forrest, 22 Mo. 344; Ferguson v. Davis Co., 57 Iowa, 601, 10 N. W. Rep. 906; Muldowney v. Illinois, etc. R. Co., 36 Iowa, 462; McKinley v. Chicago, etc. R. Co., 44 id. 314, 24 Am. Rep. 748; Blake v. Midland R. Co., 18 Q. B. 110; South & North Alabama R. Co. v. McLendon, 63 Ala. 266; Taber v. Hutson, 5 Ind. 322, 61 Am. Dec. 96; Nossaman v. Rickert, 18 Ind. 350; Smith v. Pittsburgh, etc. R. Co., 23 Ohio St. 10; Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313; McMahon v. Northern Central R. Co., 39 Md. 438; Elkhart v. Ritter, 66 Ind. 136; Indianapolis v. Gaston, 58 id. 224; Porter v. Hannibal, etc. R. Co., 71 Mo. 66, 36 Am. Rep. 454; McMillan v. Union Press Brick Works, 6 Mo. App. 434; Morris v. Chicago, etc. R. Co., 45 Iowa, 29; Quigley v. Central Pacific R. Co., 11 Nev. 350, 21 Am. Rep. 757; Hamilton v. Third Avenue R. Co., 53 N. Y. 28; Greer v. Louisville & N. R. Co., 94 Ky. 169, 177, 21 S. W. Rep. 649, 42 Am. St. 345; Atchison, etc. R. Co. v. Chance, 57 Kan. 40, 45 Pac. Rep. 60; Alabama, etc. R. Co. v. Davis, 119 Ala. 572, 24 So. Rep. 862; Southern Exp. Co. v. Platten, 93 Fed. Rep. 936, 36 C. C. A. 46; Goucher v. Jamieson, 124 Mich. 21, 82 N. W. Rep. 663; West Chicago Street R. Co. v. Foster, 175 Ill. 396, 51 N. E. Rep. 690; Maisenbacker v. Society Concordia, 71 Conn. 369, 377, 42 Atl. Rep. 67, 71 Am. St. 213; Chicago City R. Co. v. Taylor, 170 Ill. 49, 48 N. E. Rep. 831; West Chicago Street R. Co. v. Lups, 74 Ill. App. 420; North Chicago Street R. Co. v. Lehman, 82 id. 338; Kellyville Coal Co. v. Yehnka, 94 id. 74; Atchison, etc. R. Co. v. Midgett, 1 Kan. App. 138, 40 Pac. Rep. 995; Same v. Lee, 8 Kan. App. 24, 54 Pac. Rep. 4; Fort Scott, etc. R. Co. v. Lightburn, 9 Kan. App. 642, 58 Pac. Rep. 1033; Omaha Street R. Co. v. Emminger, 57 Neb. 240, 77 N. W. Rep. 675; O'Neil v. Dry Dock, etc. R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Supp. 84; San Antonio, etc. R. Co. v. Corley, 87 Tex. 432, 29 S. W. Rep. 231; Fort Worth Street R. Co. v. Ferguson, 9 Tex. Civ. App. 610, 29 S. W. Rep. 61; Reinke v. Bentley, 90 Wis. 457, 63 N. W. Rep. 1055; Atchison, etc. R. Co. v. Lamoreux, 5 Kan. App. 813, 49 Pac. Rep. 152; Consolidated Traction Co. v. Lambertson, 60 N. J. L. 457, 38 Atl. Rep. 684. See Joch v. Dankwardt, 85 Ill. 331; Johnson v. Wells, etc. Co., 6 Nev. 225, 3 Am. Rep. 245.

[1] Galveston, etc. R. Co. v. Clark, 21 Tex. Civ. App. 167, 51 S. W. Rep. 276.

[2] Wyman v. Leavitt, 71 Me. 229; Webb v. Gilman, 80 id. 177, 13 Atl. Rep. 688; Brown v. Hannibal, etc. R. Co., 99 Mo. 310, 12 S. W. Rep. 655; Brown v. Sullivan, 71 Tex. 470, 10 S. W. Rep. 288; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. Rep. 696; The Lord Derby, 17 Fed. Rep. 265; Smith v. Pittsburgh & W. R. Co., 90 Fed. Rep. 783, 788; Central R. Co. v. Serfass, 153 Ill. 379, 39 N. E. Rep. 119; American Water Works Co. v. Dougherty, 37 Neb. 373, 377, 55 N. W. Rep. 1051; Webb v. Yonkers R. Co., 51 App. Div. 194, 64 N. Y. Supp. 491;

scious of the impairment of his earning capacity,[1] or has been bitten by a dog and apprehends that hydrophobia may follow,[2] though as to the last there is not accord.[3] If, as the result of mental disability induced by the defendant's fault, the plaintiff suffered from apprehension of insanity, such suffering is an element of damages.[4] In case of fright or shock resulting from bodily injury and the circumstances connected therewith or attending the same, as a collision of trains, the accompanying explosion, fire and wreckage of the cars, there may be a recovery therefor. The fright or shock is directly attributable to the collision and injury.[5] Though the sole physical injury

Heintz v. Caldwell, 16 Ohio Ct. Ct. 630; International, etc. R. Co. v. Rhoades, 21 Tex. Civ. App. 459, 52 S. W. Rep. 979; Texas & P. R. Co. v. Scruggs, 23 Tex. Civ. App. 712, 58 S. W. Rep. 186; Norfolk & W. R. Co. v. Marpole, 97 Va. 594, 600, 34 S. E. Rep. 462; Southern Bell Telephone & Tel. Co. v. Clements, 98 Va. 1, 6, 34 S. E. Rep. 951; Antonio v. Kreusel, 17 Tex. Civ. App. 594, 43 S. W. Rep. 615. See North Chicago Street R. Co. v. Lehman, 82 Ill. App. 238.

So fixed is the union of mental suffering and physical pain "in the mind that an instruction which should direct a jury in estimating the damages to disassociate mental from physical pain and agony would be the very acme of carrying the most abstruse metaphysics of the school-man into the practical deliberations of the jury room." Fell v. Rich Hill Coal Mining Co., 23 Mo. App. 216.

It has been said that if no claim is made for mental suffering it will be better for the court not to instruct upon it; but if it is alleged that the injury deformed the plaintiff, such suffering necessarily results. Central R. & B. Co. v. Lanier, 83 Ga. 587, 10 S. E. Rep. 279. But the general rule is that damages for mental anguish need not be specially claimed where there is a physical injury. Gronan v. Kukkuck, 59 Iowa, 18, 12 N. W. Rep. 748; Morgan v. Kendall, 124 Ind. 454, 24 N. E. Rep. 143, 9 L. R. A. 445; Brown v. Sullivan, 71 Tex. 470, 10 S. W. Rep. 288. See § 1244.

In North Carolina proof of mental suffering must be made. Smith v. Railroad, 126 N. C. 712, 36 S. E. Rep. 170; Wilkie v. Railroad, 128 N. C. 113, 38 S. E. Rep. 289.

[1] Brush Electric Light & P. Co. v. Simonsohn, 107 Ga. 70, 32 S. E. Rep. 902.

[2] Warner v. Chamberlain, 7 Houst. 18, 30 Atl. Rep. 638.

[3] Where the plaintiff was bitten by a dog it was held error to permit testimony to the effect that when she was first examined by a physician he stated to her that she was in danger of hydrophobia, lockjaw and blood poisoning, as tending to show the state of the plaintiff's mind. Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. Rep. 389; McCoy v. Milwaukee Street R. Co., 88 Wis. 56, 59 N. W. Rep. 453.

[4] Walker v. Boston & M. R., 71 N. H. 271, 51 Atl. Rep. 918; Butts v. National Exchange Bank, — Mo. App. —, 72 S. W. Rep. 1083.

[5] Denver, etc. R. Co. v. Roller, 100 Fed. Rep. 738, 41 C. C. A. 22, 33, 49 L. R. A. 77; Bell v. Great Northern R. Co., 26 L. R. Ire. 428; Consolidated Traction Co. v. Lambertson, 59 N. J.

sustained arose from an attempt to escape from actual danger, damages may be recovered for the impairment of health occasioned by the consequent fright.[1]

The manner of committing the injury or its very nature [713] may be such that compensation should be given largely, and perhaps principally, for injury to the feelings. This is the case where the personal wrong is a shock to the moral sensibilities, or tends to vex, disgrace or humiliate the injured party.[2] The injury may be greatly enhanced by the motive

L. 297, 36 Atl. Rep. 100; Warren v. Boston & M. R. Co., 163 Mass. 484, 40 N. E. Rep. 895; Sloane v. Southern California R. Co., 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; Purcell v. St. Paul City R. Co., 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. A. 203; Lehigh, etc. R. Co. v. Marchant, 84 Fed. Rep. 870, 28 C. C. A. 544; Mack v. South Bound R. Co., 52 S. C. 323, 334, 29 S. E. Rep. 905, 40 L. R. A. 679, 68 Am. St. 913; Hamilton v. Great Falls Street R. Co., 17 Mont. 334, 42 Pac. Rep. 860.

In Terre Haute & I. R. Co. v. Brunker, 128 Ind. 542, 552, 26 N. E. Rep. 178, exception was taken to an instruction that the jury should take into account the peril of the plaintiff's life. The answer was: It was clearly proper to consider the hazard and jeopardy in which he was placed, in other words, the peril to his life, and allow such damages as resulted therefrom in determining the damages which he sustained, and the suffering of both body and mind which he sustained by reason of the injury. It certainly seems to us that it cannot be contended with much force that when, under such circumstances, one's life is jeopardized by the negligent acts of another and injuries follow as in this case, the defendant is not liable for the damages sustained by the plaintiff by reason of being put in such a perilous position. Louisville & N. R. Co. v. Williams, 20 Ind. App. 576, 588, 51 N. E. Rep. 128; American Tin Plate Co. v. Williams, — Ind. App. —, 65 N. E. Rep. 304.

It is error to allow damages for mental suffering and also for peril as a distinct element; the former includes the latter. San Antonio, etc. R. Co. v. Corley, 87 Tex. 432, 29 S. W. Rep. 231.

Peril in which the plaintiff was prior to the injury, and of which he knew nothing, is not an element of damage. Id.; Hall v. Manson, 90 Iowa, 585, 58 N. W. Rep. 881, 34 L. R. A. 207.

"Inconvenience" is not a ground of damage in addition to the injury sustained. Jensen v. Chicago, etc. R. Co., 86 Wis. 589, 57 N. W. Rep. 359, 22 L. R. A. 680.

[1] Buchanan v. West Jersey R. Co., 52 N. J. L. 265, 19 Atl. Rep. 254.

[2] Wolf v. Trinkle, 103 Ind. 355, 3 N. E. Rep. 110; Morgan v. Curley, 142 Mass. 107, 7 N. E. Rep. 726; Smith v. Holcomb, 99 Mass. 552; Craker v. Chicago, etc. R. Co., 36 Wis. 657, 17 Am. Rep. 504; Fay v. Swan, 44 Mich. 544, 7 N. W. Rep. 215; Ford v. Jones, 62 Barb. 484; Wadsworth v. Treat, 43 Me. 163; Welch v. Ware, 32 Mich. 84; Elliott v. Van Buren, 33 id. 49, 20 Am. Rep. 668; Kepler v. Hyer, 48 Ind. 499; Von Reeden v. Evans, 52 Ill. App. 209; Nipp v. Wiseheart, 7 Ind. App. 642, 34 N. E. Rep. 1006; Kelley v. Kelley, 8 Ind. App. 606, 614,

of the wrong-doer; and the sense of justice of jurors will always incline them to fix a higher rate of compensation whenever the wrong was wantonly or maliciously committed. Damages for pain, not being measurable by a money standard, are in some degree retributive; every circumstance which increases the turpitude of the wrong-doer's conduct adds to the injury and correspondingly to the injured party's right to compensation.[1] If actionable negligence is admitted and there

34 N. E. Rep. 1009; Crosby v. Beadley, 11 Ky. L. Rep. 954 (Ky. Super. Ct.); Sechrist v. Jahn, 11 Pa. Super. Ct. 59; Bruske v. Neugent, 116 Wis. 488, 93 N. W. Rep. 454.

In Bovee v. Danville, 53 Vt. 190, the question was whether among other damages for a personal injury resulting from a defect in a highway, the plaintiff, a mother, was entitled to recover for injury to her feelings occasioned by the loss of a child by miscarriage. Ross, J., said: "Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children and would not be comforted, a question of continuing damage is presented too delicate to be weighed by any scales which the law has yet invented." Is this sense of loss more delicate than that of injury by disfigurement or maiming?

In Smith v. Overby, 30 Ga. 241, action was brought against a physician for want of skill and care in a parturition case by which injury was inflicted on the mother and the life of the child unnecessarily destroyed. A new trial was granted because the jury were deemed to have been misled by the charge so as to overlook this latter element of the injury. Compare Augusta & S. R. Co. v. Randall, 85 Ga. 297, 322, 11 S. E. Rep. 706.

Bovee v. Danville. *supra*, is cited in Chicago, etc. R. Co. v. Caulfield, 63 Fed. Rep. 396, 11 C. C. A. 552, to sustain the proposition, which the court seems to have approved, that there cannot be a recovery for mental suffering induced by a crippled condition, such as feelings of mortification. See § 1241 and cases cited. The same conclusion was reached in Linn v. Duquesne, 204 Pa. 551, 54 Atl. Rep. 341, and in Chicago, etc. R. Co. v. Hines, 45 Ill. App. 299.

Courts of admiralty do not award liberal damages for injuries inflicted upon seamen by the officers of vessels; compensation for the physical injury is the limit; the personal indignity is not considered important. The General Rucker, 35 Fed. Rep. 152.

In Ragsdale v. Ezell, 20 Ky. L. Rep. 1567, 49 S. W. Rep. 775, a verdict for $700 was sustained in an action for hugging and kissing a woman against her will. See Bruske v. Neugent, *supra*.

It is not proper in an action for assault and battery to increase the damages because offensive questions were put by counsel after consultation with his client. Driscoll v. Collins, 31 N. B. 604. But the conduct of counsel on the trial has been considered on the question of the client's malice in other cases. See § 1216, p. 3513, note.

[1] Cases cited in first paragraph of preceding note; Root v. Sturdivant,

cannot be a recovery of punitive damages, in the absence of mental suffering, it is not proper to receive evidence showing that the negligence was gross.[1] Personal injury may cause disfigurement,[2] mutilation or permanently impaired health. When it does there is an element of mental pain for which there is no cure. When a healthy person is thus made permanently an invalid; deprived largely of his capacity to enjoy life; suddenly transformed from a mental state of cheerfulness and hope to another of melancholy by day and unrest and bad dreams by night, is he not entitled to some compensation for this physical and psychical alteration in himself?[3]

70 Iowa, 55, 29 N. W. Rep. 802; Armstrong v. Jackson, 37 La. Ann. 219; Webb v. Gilman, 80 Me. 177, 13 Atl. Rep. 688; Sloan v. Edwards, 61 Md. 89; Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152; Sampson v. Henry, 11 Pick. 379; Ransom v. New York, etc. R. Co., 15 N. Y. 415; Stuppy v. Hoff, 82 Mo. App. 272; Delmage v. Crow, 22 N. Y. Misc. 511, 49 N. Y. Supp. 1004.

[1] Rueping v. Chicago, etc. R. Co., 116 Wis. 625, 93 N. W. Rep. 843.

[2] See § 1241.

[3] Walker v. Erie R. Co., 63 Barb. 260; The Oriflamme, 3 Sawyer, 397, 404; Stewart v. Ripon, 38 Wis. 584; Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. Rep. 912. 12 Am. St. 320; Scott v. Montgomery, 95 Pa. 444; Powell v. Augusta & S. R. Co., 77 Ga. 200, 3 S. E. Rep. 757; Augusta v. Owens, 111 Ga. 464, 479, 36 S. E. Rep. 830.

In a recent case the jury were instructed to give adequate compensation for all of the physical and mental pain and suffering which the plaintiff endured at the time of the accident, and which he is reasonably certain to suffer in the future by reason of his injuries; "also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows." In considering an exception to the quoted words the reviewing court said: "It is urged that these words convey to the jury an idea different from that conveyed by the words 'mental pain and suffering' which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs would naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity, and to the thoughtless and unfeeling an object of ridicule. We think there was no error in the instructions excepted to." Heddles v. Chicago & N. R. Co., 77 Wis. 228, 46 N. W. Rep. 115, referring to Wilson v. Young, 31 Wis. 574; Craker v. Chicago, etc. R. Co., 36 id. 657, 677, 17 Am. Rep. 504; Power v. Harlow, 57 Mich. 107, 23 N. W. Rep. 606; The Oriflamme, 3 Sawy. 397; Atlantic, etc. R. Co. v. Wood, 48 Ga. 565; Toledo, etc. R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Ballou v. Farnum, 11 Allen, 73; Western & A. R. Co. v. Young, 81

There is not entire agreement as to the right to recover for some phases of mental suffering which are clearly attributable to the physical injury. There cannot be a recovery for that which will not probably be endured, as for that which might be undergone from the contemplation of what might be the result of the physical injury sustained;[1] nor for that which the plaintiff undergoes on account of the circumstances or condition of others;[2] nor for the injured feelings which may arise in the mind as the result of the injury done, not being a part of the pain naturally attending the injury.[3] In some courts "the

Ga. 397, 7 S. E. Rep. 912, 12 Am. St. 320; McMahon v. North Central R. Co., 39 Md. 438.

"We do not mean to say that, tried by an absolute standard, there is any such thing as compensation in money for the loss of an arm, or for the pain and suffering occasioned by being dismembered under the crushing wheel of a car. Only a qualified or relative compensation is possible, and the law, which is always practical, never visionary, contemplates the latter, not the former. It recognizes the restrictions imposed by many considerations, such as the limited wealth of the country, and the necessity of sparing the existence of industrial contrivances and agencies for carrying on great departments of business." Bleckley, C. J., in Western & A. R. Co. v. Young, 83 Ga. 512, 7 S. E. Rep. 912, 12 Am. St. 320.

"There must be more or less of permanent annoyance from the mutilation of a limb, irrespective of the diminished usefulness, and the jury had a right to take this into account." Power v. Harlow, 57 Mich. 107, 119, 23 N. W. Rep. 606.

Where a man of twenty-eight years lost his left arm and was made deaf in one ear, and it appeared that his earning power was decreased $300 per year, a verdict for $8,000 was sustained. "If," said the court, "pecuniary loss were the measure of damages, they are excessive; but how can the compensation for pain and for the inconvenience and mortification of going maimed through life be measured? In truth, money is no equivalent for such injuries, but it is the only reparation the law can give, and the amount must be left to the jury to fix, subject to correction in case of abuse." Anglo-American Packing & P. Co. v. Baier, 31 Ill. App. 653.

A verdict for $15,000 was sustained where a child of six years lost a leg and sustained other injuries. Admitting that the damages are large, the court observed: "Are they more than compensation? If the appellee is entitled to anything he is entitled to full compensation. Is that limited to making good the probable pecuniary loss to him from having but one leg to go upon, . . . or shall other deprivations which cannot be recited without the use of language which excludes arithmetic be taken into account? His life is wrecked, whether for business or pleasure. Hope is denied him." Chicago City R. Co. v. Wilcox, 33 Ill. App. 450.

[1] Illinois Central R. Co. v. Cole, 165 Ill. 334, 46 N. E. Rep. 275.

[2] Atchison, etc. R. Co. v. Chance, 57 Kan. 40, 45 Pac. Rep. 60.

[3] Chicago City R. Co. v. Taylor, 170 Ill. 49, 48 N. E. Rep. 831.

mental pain that comes from the contemplation of a maimed body, and the humiliation of going through life in a crippled condition, is too remote to be considered an element of damage. The mental pain that may be considered and allowed for is such as is the direct result or concomitant of the physical pain suffered."[1] Mental pain endured after physical suffering has ceased cannot be recovered for.[2] In Texas loss of capacity for the enjoyment of the pleasures of life is too vague a ground upon which to recover.[3] But in Indiana the appellate court approved an instruction to the effect that the jury might consider the fact that the plaintiff was deprived of the pleasure and satisfaction in life that those only can enjoy who are possessed of a sound body and the free use of all its members.[4] This is in accord with the view held in Michigan, Washington and Missouri. In the former state an instruction to the effect that the jury might consider the shame and mortification which the plaintiff suffered by being obliged to use crutches was ap- [714] proved.[5] In such cases the loss or decrease of capacity to pursue one's calling and earn money is universally accepted as a proper subject of compensation. This feature of the injury will be presently considered.

§ 1244. Same subject. In an action for personal violence or negligent injury it is no defense that the blows or acts of the defendant aggravated a disease which the plaintiff knew he was subject to, and that the defendant had no information in relation to it.[6] It is immaterial to the application of this

[1] Chicago City R. Co. v. Anderson, 182 Ill. 298, 55 N. E. Rep. 366, 80 Ill. App. 71; Decatur v. Hamilton, 89 id. 561; Giffen v. Lewiston, 55 Pac. Rep. 545 (Idaho); Chicago City R. Co. v. Mauger, 105 Ill. App. 579.

[2] North Chicago Street R. Co. v. Duebner, 85 Ill. App. 602.

[3] Locke v. International, etc. R. Co., 25 Tex. Civ. App. 145, 60 S. W. Rep. 314.

[4] American Strawboard Co. v. Foust, 12 Ind. App. 421, 431, 39 N. E. Rep. 891.

[5] Beath v. Rapid R. Co., 119 Mich. 512, 78 N. W. Rep. 537; Schmitz v. St. Louis, etc. R. Co., 119 Mo. 256, 24 S. W. Rep. 472, 23 L. R. A. 250; Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. Rep. 206.

[6] Purcell v. St. Paul City R. Co., 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. A. 203; Weiting v. Millston, 77 Wis. 523, 46 N. W. Rep. 879; Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. Rep. 624; Jordan v. Seattle, 30 Wash. 298, 70 Pac. Rep. 743; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 So. Rep. 363; Coleman v. New York, etc. R. Co., 106 Mass. 160; Louisville, etc. R. Co. v. Jones, 108 Ind. 551, 9 N. E. Rep. 476; Shumway v. Walworth & N. Manuf. Co., 98 Mich. 411, 57 N. W.

principle that the susceptibility of the plaintiff to the disease which followed his injury was the result of his voluntary acts.[1] The wrong-doer must answer for any aggravation of the plaintiff's condition for which he is responsible, and that is the limit of his liability.[2] In a case in which the plaintiff sued to recover for a second injury inflicted by the defendant, the recovery for the prior injury being based on the theory that it was permanent, and the second action being brought to recover damages for a like injury, the court said that it was important to get a clear view of the effect of the first judgment and the questions determined by it. Her complaint was broad enough in that action to permit a recovery for a permanent

Rep. 251; Hall v. Cadillac, 114 Mich. 99, 72 N. W. Rep. 33; Emery v. Boston & M. R. Co., 67 N. H. 434, 36 Atl. Rep. 367; Crouse v. Chicago & N. R. Co., 104 Wis. 473, 483, 80 N. W. Rep. 752, citing the text; Crane Elevator Co. v. Lippert, 63 Fed. Rep. 942, 11 C. C. A. 521; Vosburg v. Putney, 86 Wis. 278, 56 N. W. Rep. 480; Collins v. Janesville, 99 Wis. 464, 75 N. W. Rep. 88; Denver v. Hyatt, 28 Colo. 129, 63 Pac. Rep. 403; Mullin v. Flanders, 73 Vt. 95, 50 Atl. Rep. 813 (applying the rule to a case of malpractice).

[1] Maguire v. Sheehan, 117 Fed. Rep. 819, 54 C. C. A. 642, citing Turner v. Nassau E. R. Co., 41 App. Div. 213, 58 N. Y. Supp. 490; Sullivan v. Marin, 175 Mass. 422, 56 N. E. Rep. 600.

[2] Rock Island v. Starkey, 189 Ill. 515, 526, 59 N. E. Rep. 971; Louisville & N. R. Co. v. Kingman, 18 Ky. L. Rep. 82, 35 S. W. Rep. 264; Schwingschlegl v. Monroe, 113 Mich. 683, 72 N. W. Rep. 7; Gulf, etc. R. Co. v. Brown, 16 Tex. Civ. App. 93, 40 S. W. Rep. 608; Bagley v. Mason, 69 Vt. 175, 37 Atl. Rep. 287; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 216, 9 So. Rep. 363; Louisville & N. R. Co. v. Snyder, 117 Ind. 435, 20 N. E. Rep. 284, 10 Am. St. 60, 3 L. R. A. 434; Watson v. Rinderknecht, 82 Minn. 235, 84 N. W. Rep. 798; Chicago & E. R. Co. v. Binkopski, 72 Ill. App. 22.

In an action against a physician for malpractice he cannot escape responsibility because the plaintiff's condition is only in part attributable to his wrong. The jury must distinguish, as best they can, the pain, suffering and injuries or ill-health of the plaintiff, so far as they are chargeable to the defendant, from such as he is not responsible for. Gates v. Fleischer, 67 Wis. 504, 30 N. W. Rep. 674. See next note; Miller v. Frey, 49 Neb. 472, 68 N. W. Rep. 630.

The plaintiff may not recover for any aggravation of his injury resulting from his voluntary imprudence in the use of his injured member. Carpenter v. McDavitt, 53 Mo. App. 393; Raymond v. Haverhill, 168 Mass. 382, 47 N. E. Rep. 101.

Non-observance by an injured person of the directions of his physician will not necessarily prevent a recovery for damages subsequently accruing except in so far as they resulted from such non-observance. Keyes v. Cedar Falls, 107 Iowa, 509, 78 N. W. Rep. 227; Fullerton v. Fordyce, 144 Mo. 519, 533, 44 S. W. Rep. 1053; Du Boes v. Decker, 130 N. Y. 325, 29 N. E. Rep. 313, 27 Am. St. 529, 14 L. R. A. 429; McCracken v. Smathers, 122 N. C. 799, 29 S. E. Rep. 354.

injury to the back and knee and the proof tended to sustain that claim. As the result of these injuries the jury could have found that she became incapacitated from teaching elocution and painting on china since she could not walk up and down the stage and gesticulate, and she was unable to carry anything on crutches which she was obliged to use after the first accident. The verdict was general, and must be deemed to cover compensation for every element of damages embraced within the pleadings and proofs. Hence it is obvious that the plaintiff can recover in this action only for such additional injuries as may be properly and legally attributed to the second accident. For any new injury, the result of that accident, she may be awarded damages, and, therefore, as the injury to the wrist was new, she is entitled to recover for that. In so far as the old injuries were increased or aggravated by the second accident she may also recover, but since it was admitted that there was no new or additional injury to the knee, no damages can be awarded for that in this action. In so far as the old injuries were increased or aggravated by the second accident, she may also recover. And since the first judgment was for damages resulting from her disability to teach elocution or paint on china, her present disability to do these things cannot legally be attributed to the last accident. . . . It may be true that by the second accident she became disabled in some other way and was in consequence incapacitated from doing something else that she could have done before and subsequent to the first accident, and so far she had a right of recovery in the second action.[1] The rule of liability stated in the first sentence of this section rests on the principle that in actions for tort the party who commits a trespass or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done and may have been the indirect result thereof.[2] A wrongful act which subjects the in-

[1] Brooks v. Rochester R. Co., 156 N. Y. 244, 50 N. E. Rep. 945.

[2] Per Taylor, J., in Brown v. Chicago, etc. R. Co., 54 Wis. 354, 11 N. W. Rep. 356, 911, citing 1 Sedgw. Meas. Dam. 130, note; Eden v. Luyster, 60 N. Y. 252; Hill v. Winsor, 118 Mass. 251; Lane v. Atlantic Works, 111 id. 136; Keenan v. Cavanaugh, 44 Vt. 268; Little v. Boston, etc. R. Co., 66 Me. 239; Collard v. South Eastern R. Co., 7 H. & N. 79; Hart v. Western R.

jured party to other and dependent causes which it sets in motion imposes liability for the effects upon the wrong-doer,[1] as where mistakes have been made, notwithstanding the exercise of ordinary care in the selection of a medical attendant for one injured; injuries caused by such mistakes are attributable to the original wrong-doer.[2]

Co., 13 Met. 99, 104; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Metallic Compression Casting Co. v. Fitchburg R. Co., 109 id. 277, 12 Am. Rep. 689; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Perley v. Eastern R. Co., 98 Mass. 414; Kellogg v. Chicago, etc. R. Co., 26 Wis. 223, 7 Am. Rep. 69; Patten v. Chicago, etc. R. Co., 32 id. 524, 36 id. 413; Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Bowas v. Pioneer Tow Line, 2 Sawyer, 21. See § 13; Sharp v. Powell, L. R. 7 C. P. 258; Putnam v. Broadway, etc. R. Co., 55 N. Y. 108, 14 Am. Rep. 190; McGrew v. Stone, 53 Pa. 436; Servatius v. Pichel, 34 Wis. 299; Hughes v. McDonough, 43 N. J. L. 461, 39 Am. Rep. 603. The text is quoted with approval in Baltimore, etc. R. Co. v. Kemp, 61 Md. 74, where it is held that a tendency or predisposition to cancer is not an objection to a recovery for the suffering caused by it, if the cancer was the natural and proximate consequence of the injury. The doctrine of the text is applied in Louisville, etc. R. Co. v. Falvey, 104 Ind. 409, 426, 3 N. E. Rep. 389, 4 id. 908; Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; McNamara v. Clintonville, 62 Wis. 270, 22 N. W. Rep. 472, quoting the text; Phillips v. London, etc. R. Co., 42 L. T. Rep. 6; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. Rep. 559, 12 L. R. A. 257; Lafler v. Fisher, 121 Mich. 60, 79 N. W. Rep. 934; Postal Tel. Cable Co. v. Hulsey, 132 Ala. 444, 31 So. Rep. 527; Clukey v. Seattle Electric Co., 27 Wash. 70, 67 Pac. Rep. 379; Watson v. Rinderknecht, 82 Minn. 235, 84 N. W. Rep. 798; Woodward v. Boscobel, 84 Wis. 226, 54 N. W. Rep. 332; Crouse v. Chicago & N. R. Co., 104 Wis. 473, 483, 80 N. W. Rep. 752, citing the text; Metropolitan Street R. Co. v. Hudson, 51 C. C. A. 283, 113 Fed. Rep. 449. *Contra*, Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89. See § 36.

In Stewart v. Ripon, 38 Wis. 591, Lyon, J., said: "The public streets and sidewalks in a city are not constructed and maintained for the sole use of healthy and robust people, but for the use of the infirm, the sick and the decrepit, as well. They may lawfully be traveled by every citizen without regard to age, sex or physical condition. If the city negligently permits such streets or sidewalks to remain out of repair, and any person (who is himself free from negligence) is injured thereby, the city is liable for the injury. It is chargeable with knowledge that people of different bodily condition travel its streets, and that among these are the weak, the decrepit, and those with organic predisposition to disease. It is reasonable to expect that in certain cases, if an injury happen to one of the latter class, his full recovery therefrom may be retarded or prevented by such predisposition or

[1] Crane Elevator Co. v. Lippert, 63 Fed. Rep. 942, 11 C. C. A. 521, 528.

[2] Chicago City R. Co. v. Cooney, 196 Ill. 466, 63 N. E. Rep. 1028.

[715] The plaintiff may show specific direct effects of the injury without specially alleging them, as that he was thereby made subject to fits.[1] If they were a part of the result of the injury he may recover for such damage without spe-

tendency to disease. In the present case the defendant is chargeable with knowledge that persons with a constitutional tendency to scrofula (a very large class in any community) constantly travel its streets and sidewalks, and that such tendency to that disease might greatly aggravate a bodily injury. Hence it had reasonable grounds to expect that if one of that class were injured by reason of the admitted defect in the sidewalk, the disease might develop, and greatly retard and prevent a cure, as in this case. If these views are correct, it necessarily follows that the negligence of the defendant was the proximate cause of the whole injury for which the plaintiff recovered damages." See Oliver v. La Valle, 36 Wis. 592. The principle of the case quoted from has been often applied. Alabama, etc. R. Co. v. Yarbrough, 83 Ala. 238, 3 So. Rep. 447, 3 Am. St. 715; Baltimore & L. Turnpike Co. v. Cassell, 66 Md. 418; Tice v. Munn, 94 N. Y. 621; Houston, etc. R. Co. v. Shafer, 54 Tex. 641; McNamara v. Clintonville, 62 Wis. 207, 22 N. W. Rep. 472; Ehrgott v. Mayor, 96 N. Y. 264, 281, 48 Am. Rep. 622; Denver, etc. R. v. Harris, 122 U. S. 597, 7 Sup. Ct. Rep. 1286; Driess v. Frederick, 73 Tex. 460, 11 S. W. Rep. 493.

A surgeon assumes to exercise the ordinary care and skill of his profession, and is liable for injuries resulting from his failure to do so; yet if the patient neglects to obey his reasonable instructions and thereby contributes to the injury complained of, he cannot recover for such injury. Geiselman v. Scott, 25 Ohio St. 86.

In other places in this work the doctrine of remote and proximate cause has been sufficiently stated. A New York case is referred to here because it illustrates the proposition stated in the text and disapproves a series of cases with which the author is unable to agree. The plaintiff, driving on a rainy night, came to a ditch in a street; the axle of his vehicle was broken, and he was dragged over the dashboard. Another carriage was procured and he drove to his home, several miles distant, in the rain and cold. His evidence tended to show that the diseases from which he subsequently suffered were the result of the strain and shock; while the defendant's evidence tended to show that they were caused by the exposure to the cold and rain. It was held that the exposure was the direct and proximate result of the accident. Ehrgott v. Mayor, 96 N. Y. 264, 48 Am. Rep. 622, disapproving Hobbs v. London, etc. R. Co., L. R. 10 Q. B. 111; McMahon v. Field, 7 Q. B. Div. 591; Waller v. Midland Great Western R. Co., 12 Ir. L. T. Rep. 145; Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89; Indianapolis, etc. R. Co. v. Birney, 71 Ill. 391; Francis v. St. Louis Transfer Co., 5 Mo. App. 7.

[1] Tyson v. Booth, 100 Mass. 258; Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. Rep. 297; Morgan v. Kendall, 124 Ind. 454, 24 N. E. Rep. 143, 9 L. R. A. 445; Rea v. St. Louis Southwestern R. Co., 73 S. W. Rep. 555 (Tex. Ct. of Civ. App.); Sloan v. Edwards, 61 Md. 89; Hussey v. Ryan, 64 id. 426; H. & T. C. R. Co. v. Leslie, 57 Tex. 83; Kemp v. Baltimore City Passenger R. Co., 61 Md. 79; Baltimore City Passenger R. Co. v.

cially alleging it, as well as for the pain and disability which followed.[1] The obviously probable effects of the injury may be given in evidence though not laid in the declaration.[2] Thus, where one of the direct consequences of a wound was the loss of the power to have offspring, evidence of that fact was admissible, though the declaration did not specifically designate that consequence.[3] Under an allegation that plaintiff suffered great bodily harm, became and still continued to be sick, sore and disabled; was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business, the permanent character of the injury sustained may be proven.[4] Where it was alleged that the defendant sustained serious and permanent physical in-

Baer, 90 Md. 97, 44 Atl. Rep. 992; Beath v. Rapid R. Co., 119 Mich. 512, 78 N. W. Rep. 537; Garbaczewski v. Third Avenue R. Co., 5 App. Div. 186, 39 N. Y. Supp. 33; Wood v. New York Central, etc. R. Co., — App. Div. —, 82 N. Y. Supp. 160; Montgomery v. Lansing City Electric R. Co., 103 Mich. 46, 61 N. W. Rep. 543, 29 L. R. A. 287; St. Louis Trust Co. v. Murmann, 90 Mo. App. 555.

Under an allegation that an injury to the hand necessitated the amputation of three fingers, it may be shown that since the action was begun it became necessary to amputate the remainder of the hand. Pittsburgh, etc. R. Co. v. Blair, 11 Ohio Ct. Ct. 579.

There cannot be a recovery for increased suffering because of a pre-existing ailment unless such suffering is pleaded. Hall v. Cadillac, 114 Mich. 99, 72 N. W. Rep. 33.

[1] Id.; Youngblood v. South Carolina & G. R. Co., 60 S. C. 9, 38 S. E. Rep. 232, quoting the text. See Croco v. Oregon Short Line R. Co., *infra*.

[2] Avery v. Ray, 1 Mass. 12; Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. Rep. 297; Johnson v. McKee, 27 Mich. 471, followed in Montgomery v. Lansing City Electric R. Co., *supra*, disapproving contrary expressions in other cases, and quoting the text; Ankrum v. Marshalltown, 105 Iowa, 493, 75 N. W. Rep. 360; Fort Scott, etc. R. Co. v. Lightburn, 9 Kan. App. 642, 58 Pac. Rep. 1033; Howard v. Stiles, 54 Neb. 26, 74 N. W. Rep. 399; Wabash R. Co. v. Savage, 110 Ind. 156, 168, 9 N. E. Rep. 85; Bruce v. Beall, 99 Tenn. 303, 41 S. W. Rep. 445; San Antonio, etc. R. Co. v. Weigers, 22 Tex. Civ. App. 344, 54 S. W. Rep. 910, citing the text; Robinson v. Marino, 3 Wash. 434, 441, 28 Pac. Rep. 752, 28 Am. St. 50, citing the text; Delie v. Chicago, etc. R. Co., 51 Wis. 400, 8 N. W. Rep. 265; Stevenson v. Morris, 37 Ohio St. 10, 41 Am. Rep. 481.

[3] Denver, etc. R. v. Harris, 122 U. S. 597, 7 Sup. Ct. Rep. 1286. See Jones v. Niagara Junction R. Co., 63 App. Div. 607, 71 N. Y. Supp. 647. The five preceding propositions are quoted in Croco v. Oregon Short Line R. Co., 18 Utah, 311, 318, 54 Pac. Rep. 985, 54 L. R. A. 285.

[4] Ehrgott v. Mayor, 96 N. Y. 264, 48 Am. Rep. 622; Hall v. Cadillac, 114 Mich. 99, 72 N. W. Rep. 33. Compare Kalembach v. Michigan Central R. Co., 87 Mich. 509, 49 N. W. Rep. 1082.

juries internally and externally, was caused great pain, suffering and impairment of bodily health, it was competent to show that a miscarriage occurred seven months after the injury was sustained.[1] But under a general averment of mental suffering, anxiety and suspense, there cannot be a recovery for such suffering occasioned by the postponement of the plaintiff's marriage.[2] If a miscarriage is produced by a physical injury, damage cannot be recovered for the loss of the society, enjoyment and prospective services of the child, these not being elements of damage;[3] the miscarriage may be considered in awarding damages for pain and suffering, mental and physical, if these were aggravated by it.[4] A difference of opinion exists between the Washington court and the Minnesota court as to the proof of increased suffering where there is a premature birth over that which occurs when the birth is in due course of time. In the former state it is necessary to show that increased suffering resulted by appropriate evidence; mere proof of the premature delivery of a child, though it was dead as the result of an injury to the mother, is not sufficient.[5] In the latter, there may be a recovery of substantial damages in such a case without such proof being made.[6]

§ 1245. Same subject. Mental suffering alone, unconnected with any other legal wrong, will not, according to the great weight of authority, support an action; it is only when some act is done which will constitute a cause of action that such suffering can be considered.[7] This is not a cause of action,

[1] Chicago City R. Co. v. Cooney, 196 Ill. 466, 63 N. E. Rep. 1029. See Parker v. Ottumwa, 113 Iowa, 649, 85 N. W. Rep. 805.

[2] Beath v. Rapid R. Co., 119 Mich. 512, 78 N. W. Rep. 537.

[3] Tunnicliffe v. Bay Cities Consolidated R. Co., 102 Mich. 624, 61 N. W. Rep. 11, 32 L. R. A. 142; Butler v. Manhattan R. Co., 143 N. Y. 417, 38 N. E. Rep. 454, 42 Am. St. 738, 26 L. R. A. 46. See Bovee v. Danville, 53 Vt. 190, stated in note to § 1243.

[4] Tunnicliffe v. R. Co., *supra;* Oliver v. La Valle, 36 Wis. 592; Brown v. Chicago, etc. R. Co., 54 Wis. 342, 11 N. W. Rep. 356; Shartle v. Minneapolis, 17 Minn. 308, 318; Witrak v. Nassau Electric R. Co., 52 App. Div. 234, 65 N. Y. Supp. 257; Hawkins v. Front Street Cable R. Co., 3 Wash. 592, 600, 28 Pac. Rep. 1021, 28 Am. St. 72, 16 L. R. A. 808.

[5] Hawkins v. Front Street Cable R. Co., *supra.*

[6] Plonty v. Murphy, 82 Minn. 268, 84 N. W. Rep. 1005.

[7] Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313; St. Louis Southwestern R. Co. v. Mitchell, 25 Tex. Civ. App. 197, 60 S. W. Rep. 891; Keyes v. Minneapolis, etc. R. Co., 36 Minn. 290, 30 N. W. Rep. 888; Atchison, etc. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac.

but an aggravation of damages when it naturally ensues from the act complained of. In Massachusetts a town is liable in damages for an injury to the person resulting from a defect in a highway; but an action cannot be maintained on account of a risk or peril merely which has caused fright and mental suffering.[1] "Though the bodily injury may have been very small, yet if it was a ground of action within the statute, and

Rep. 453; Sanderson v. Northern Pacific R. Co., — Minn. —, 92 N. W. Rep. 542; Sloane v. Southern California R. Co., 111 Cal. 668, 679, 32 L. R. A. 193, 44 Pac. Rep. 320, citing the text; Haas v. Metz, 78 Ill. App. 46; Braun v. Craven, 175 Ill. 401, 51 N. E. Rep. 657, 42 L. R. A. 199; West Chicago Street R. Co. v. Liebig, 79 Ill. App. 567; Kalen v. Terre Haute & I. R. Co., 18 Ind. App. 202, 47 N. E. Rep. 694, 63 Am. St. 343; Butner v. Western U. Tel. Co., 2 Okl. 234, 243, 37 Pac. Rep. 1087, citing the text; Huffman v. T. & O. C. R. Co., 9 Ohio Dec. 748; Cleveland City R. Co. v. Ebert, 19 Ohio Ct. Ct. 725; San Antonio, etc. R. Co. v. Corley, 87 Tex. 432, 29 S. W. Rep. 231, citing the text; Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. Rep. 354, 56 Am. St. 604, 34 L. R. A. 781; Victorian Railway Commissioners v. Coultas, L. R. 13 App. Cas. 222; Ewing v. Pittsburgh, etc. R. Co., 147 Pa. 40, 14 L. R. A. 666, 23 Atl. Rep. 340; Johnson v. Wells, etc. Co., 6 Nev. 224, 3 Am. Rep. 245; Renner v. Canfield, 36 Minn. 90, 30 N. W. Rep. 435, 1 Am. St. 654; Haile's Curator v. Texas & P. R. Co., 60 Fed. Rep. 557, 9 C. C. A. 134, 23 L. R. A. 774. See §§ 21–24, 975–980.

In Lee v. Burlington, 113 Iowa, 356, 85 N. W. Rep. 618, 86 Am. St. 379, the rule was applied in an action to recover for a horse whose death was caused by fright. The occurrence was said to be so unusual that it could not be considered the proximate result of the negligence.

Under a civil damage statute providing for the recovery by a wife who is injured in person or property or means of support or otherwise by the sale of liquor contrary thereto, there may be a recovery of damages for injury to her feelings. Radley v. Seider, 99 Mich. 431, 58 N. W. Rep. 366. The same statute includes others than wives; but the right to recover for injured feelings does not extend to an eleven-year-old daughter of an habitual drunkard, her suit being based upon a single transaction. The injury to the feelings which may be recovered for is the shame, mortification or disgrace arising from the fact of intoxication, and not the mental anguish suffered because of an injury received by the person who became intoxicated. Sissing v. Beach, 99 Mich. 439, 58 N. W. Rep. 364.

A married woman may recover for the shame, disgrace and mortification arising from the public conviction of her husband for drunkenness, though the trial occurred after her suit was begun. A newspaper article giving an account of a saloon row and of the husband's participation therein is admissible as bearing upon the plaintiff's mental anguish. Lucker v. Liske, 111 Mich. 683, 70 N. W. Rep. 421.

Under the Adair liquor law a wife may recover for sickness caused by nervousness occasioned by the verbal abuse of her by her husband while intoxicated. Kear v. Garrison, 13 Ohio Ct. Ct. 447.

[1] Canning v. Williamstown, 1 Cush. 451. See §§ 21–24, 975–980.

caused mental suffering, that suffering was a part of the injury for which he was entitled to damages."[1] It was also held in [716] an action on the case for simple negligence in blasting out a ledge within the located limits of a railroad, whereby rocks were thrown upon the plaintiff's land and buildings, that his mental anxiety in relation to his own personal safety or that of his child is not, in the absence of personal injury, an element of damage.[2] "If the law were otherwise it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision, or by trains leaving the track, could maintain an action against the company."[3] But the question is said to be different when an injury produces a shock. "Shock is not fright; the latter may be a producing cause of the former, and where it is the sole producing cause there can be no recovery; but when it is associated with actual injury it may be considered, and where the injury and the fright concur and result in producing shock, out of which arises damage, it is sufficient upon which to base a recovery."[4] A shock or injury to the nervous system occasioned by a tort is, in California, regarded as a physical injury producing suffering to the body rather than to the mind, though the mind be at the same time injuriously affected.[5] In a Maryland case the plaintiff offered evidence to show that the accident complained of caused a shock to his

[1] Id.; City Transfer Co. v. Robinson, 12 Ky. L. Rep. 555 (Ky. Super. Ct.); O'Flaherty v. Nassau Electric R. Co., 34 App. Div. 74, 54 N. Y. Supp. 96, affirmed without opinion, 165 N. Y. 624; Schmitt v. Milwaukee Street R. Co., 89 Wis. 195, 199, 61 N. W. Rep. 834.

[2] Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303.

[3] Id. In the note to this case in 36 Am. Rep. 306, the editor says, "there can be no doubt that mental suffering forms a proper element of damage in actions for intentional and wilful wrong, and in actions of negligence resulting in bodily injury; but whether it forms an independent ground of action, disconnected from these facts, is more doubtful." His note, however, does not afford an instance in which it was the ground of action. In all of the cases stated there was a legal cause of action independent of injury to feelings. See §§ 21–24, 975–980.

[4] Jones v. Brooklyn Heights R. Co., 23 App. Div. 141, 48 N. Y. Supp. 914; Purcell v. St. Paul City R. Co., 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. A. 203.

[5] Sloane v. Southern California R. Co., 111 Cal. 668, 680, 44 Pac. Rep. 320, 32 L. R. A. 193; St. Louis Southwestern R. Co. v. Mitchell, 25 Tex. Civ. App. 197, 60 S. W. Rep. 891; Watkins v. Kaolin Manuf. Co. 131 N. C. 536, 42 S. E. Rep. 983.

nervous system which injured the optic nerve and diminished his power to make calculations, and subsequently produced emaciation. This was held admissible, the shock not being made an independent ground for awarding damages, but only being considered in connection with other evidence to determine the extent of the injury suffered.[1] In Massachusetts simple negligence does make the defendant liable for a bodily injury resulting from mere fright and mental disturbance;[2] and such is the rule favored by the New York court of appeals.[3] In the former state, if a slight injury to the person is accompanied by a nervous shock caused by the same wrongful act as such injury, there may be a recovery for the consequences of such shock regardless of whether it was due to the visible injury or merely accompanied it.[4] And it has also been held there that when "fright reasonably induces action which results in external injury, the defendant may be liable as well as when the impact is brought about without the intervention of the plaintiff's consciousness."[5]

Such mental anxiety as comes from apprehension concerning the future of the family of an injured man is not a natural result of the injury, but depends upon circumstances independent of it, as the pecuniary condition and social relations of the sufferer.[6] In an action to recover for an indecent assault the injury done to the plaintiff's good name, honor and reputation cannot be considered.[7] The award for mental suffering will be determined by the circumstances. In a Canadian case in which no physical injury was sustained as the result of a trifling assault, the fright being but momentary, and the plaintiff having repelled all advances for a settlement or apology, and began and then abandoned a prosecution be-

[1] Baltimore City Passenger R. Co. v. Baer, 90 Md. 97, 44 Atl. Rep. 992. Compare Washington & G. R. Co. v. Dashiell, 7 D. C. App. Cas. 507, 514.

[2] Spade v. Lynn & B. R. Co., 168 Mass. 285, 47 N. E. Rep. 88, 60 Am. St. 393, 38 L. R. A. 512; White v. Sander, 168 Mass. 296, 47 N. E. Rep. 90.

[3] Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. Rep. 354, 56 Am. St. 604, 34 L. R. A. 781.

[4] Homans v. Boston E. R. Co., 180 Mass. 456, 57 L. R. A. 291, 91 Am. St. 324, 63 N. E. Rep. 737.

[5] Cameron v. New England Telephone & Tel. Co., 182 Mass. 310, 65 N. E. Rep. 385.

[6] Texas Mexican R. Co. v. Douglass, 69 Tex. 694, 7 S. W. Rep. 77.

[7] Atkins v. Gladwish, 25 Neb. 390, 41 N. W. Rep. 347.

fore a magistrate and sued for damages, the court refused to permit the recovery of a larger sum than would have been imposed as a fine if the prosecution had not been discontinued.[1] Juries have no discretion to allow interest upon the amount awarded for pain and suffering.[2] Some courts favor recovery for mental suffering where the wrong done the sufferer was wilful, wanton or malicious, especially where its obvious purpose was to wound, humiliate or oppress another.[3]

§ 1246. Loss of time, injury to business, diminished capacity. These heads of injury are similar and represent recoverable elements of damage where the facts show that they exist.[4] They represent in part, and often chiefly, the pecun-

[1] Papineau v. Taber, Montreal L. R. 2 Q. B. 107.

[2] Western A. R. Co. v. Young, 81 Ga. 397, 7 S. E. Rep. 912, 12 Am. St. 320.

[3] Hickey v. Welch, 91 Mo. App. 4, 14; Cooper v. Hopkins, 70 N. H. 271, 279, 48 Atl. Rep. 100; Williams v. Underhill, 63 App. Div. 223, 71 N. Y. Supp. 291. See § 21 *et seq.*

[4] Chicago & E. R. Co. v. Holland, 122 Ill. 461, 13 N. E. Rep. 145; Indiana Car Co. v. Parker, 100 Ind. 182; Louisville, etc. R. Co. v. Falvey, 104 id. 409, 430, 3 N. E. Rep. 389, 4 id. 908; Central Passenger R. Co. v. Kuhn, 86 Ky. 578, 6 S. W. Rep. 441, 9 Am. St. 309; Morgan v. Curley, 142 Mass. 107, 7 N. E. Rep. 726; Huizega v. Cutler & S. Lumber Co., 51 Mich. 272, 16 N. W. Rep. 643; Wallace v. Western North Carolina R. Co., 104 N. C. 442, 10 S. E. Rep. 552; Scott v. Montgomery, 95 Pa. 444; Giles v. Diamond State Iron Co., 7 Houst. 453, 459, 8 Atl. Rep. 368; Murphy v. Hughes, 1 Pennewill, 250, 262, 40 Atl. Rep. 187; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. Rep. 145; Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. Rep. 714; Linton Coal & M. Co. v. Persons, 11 Ind. App. 264, 278, 39 N. E. Rep. 214; Ankrum v. Marshalltown, 105 Iowa, 493, 75 N. W. Rep. 360; Standard Oil Co. v. Tierney, 92 Ky. 367, 14 L. R. A. 677, 17 S. W. Rep. 1025, 36 Am. St. 595; Rooney v. New York, etc. R. Co., 173 Mass. 222, 53 N. E. Rep. 435; Moore v. Kalamazoo, 109 Mich. 176, 66 N. W. Rep. 1089; Brooks v. Rochester R. Co., 156 N. Y. 244, 50 N. E. Rep. 945; McCracken v. Smathers, 122 N. C. 799, 29 S. E. Rep. 354; Knittel v. Schmidt, 16 Tex. Civ. App. 7, 40 S. W. Rep. 507; Vicksburg, etc. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. Rep. 1; Washington & G. R. Co. v. Patterson, 9 D. C. App. Cas. 423; Denver v. Hyatt, 28 Colo. 129, 63 Pac. Rep. 403.

Under a statute providing that any person who shall receive bodily injury or damage in his person or property through a defect in a highway may recover the amount of actual damages sustained by him by reason thereof, there cannot be a recovery for loss of time where the injury was to property. Pearson v. Spartanburg County, 51 S. C. 480, 29 S. E. Rep. 193.

The phrases "loss of time" and "diminished capacity to labor" are not equivalent to the extent that one wholly includes the other; hence a recovery for both is not objectionable on the ground that it is double. Knittel v. Schmidt, 16 Tex. Civ. App.

iary loss from personal injury. To the extent that it prevents the plaintiff from pursuing his accustomed employment or business, it deprives him of pecuniary benefits which he would otherwise have realized. If he was under employment at fixed wages or salary, the amount of loss during a reasonable term of engagement, or the temporary duration of such disability, may be readily determined,[1] if the circumstances are not such as to permit of collusion between employer and employee, as where a husband is employed by his wife to take charge of a store for her. In such a case evidence to show the volume of the business done and the usual compensation paid in the neighborhood for such services as the husband rendered is admissible.[2] Where the injured party was not employed at a fixed compensation but was conducting a business, the extent and nature of it may be shown; and in many cases, as when professional men and other laborers have an established patronage, their antecedent pecuniary rewards. These facts are not shown as affording a measure of damages, but to aid the jury in estimating a fair and just compensation for being prevented by the injury from engaging in or prosecuting such business or work.[3] If the plaintiff's earnings are the result of his personal

7, 10, 40 S. W. Rep. 507; Gulf, etc. R. Co. v. Warner, 22 Tex. Civ. App. 167, 54 S. W. Rep. 1064; Galveston, etc. R. Co. v. Lynch, 22 Tex. Civ. App. 336, 55 S. W. Rep. 389.

[1] Mauerman v. St. Louis, etc. R. Co., 41 Mo. App. 348; McIntyre v. New York Central R. Co., 37 N. Y. 287; Braithwaite v. Hall, 168 Mass. 38, 46 N. E. Rep. 398.

If the plaintiff's injury has not prevented him from working, but merely lessened his ability to work, the value of his time may be proven. Baxter v. Chicago, etc. R. Co., 87 Iowa, 488, 54 N. W. Rep. 350.

[2] McKenna v. Citizens' Natural Gas Co., 201 Pa. 146, 50 Atl. Rep. 922.

[3] Alabama, etc. R. Co. v. Yarbrough, 83 Ala. 238, 3 So. Rep. 447, 3 Am. St. 715; Carthage Turnpike Co. v. Andrews, 102 Ind. 138, 1 N. E. Rep. 364, 52 Am. Rep. 653; Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. Rep. 297; Stafford v. Oskaloosa, 64 Iowa, 251, 20 N. W. Rep. 174; Joslin v. Grand Rapids Ice Co., 53 Mich. 322, 19 N. W. Rep. 17; Griveaud v. St. Louis Cable & W. R. Co., 33 Mo. App. 458, 466; Alabama, etc. R. Co. v. Frazier, 93 Ala. 45, 9 So. Rep. 303; Nebraska City v. Campbell, 2 Black, 590; Atchison v. King, 9 Kan. 550; Nones v. Northouse, 46 Vt. 587; Ballou v. Farnum, 11 Allen, 73; Wilson v. Young, 31 Wis. 574; Howes v. Ashfield, 99 Mass. 540; Tefft v. Wilcox, 6 Kan. 46; Lincoln v. Saratoga, etc. R. Co., 23 Wend. 425; Ransom v. New York, etc. R. Co., 15 N. Y. 415; Hill v. Winsor, 118 Mass. 251; Indianapolis v. Gaston, 58 Ind. 224; Morris v. Chicago, etc. R. Co., 45 Iowa, 29; Clifford v. Dam, 44 N. Y. Super. Ct. 391; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Tom-

skill and services the amount he has realized for a series of years shows what he was worth to himself and what he was capable of earning, and affords the best basis from which the jury can estimate his loss from the inability to follow his vocation.[1] But this rule does not apply where his income has been made in trade or in manufacturing, if the profits thereof are of such a nature that they are uncertain,[2] and is entirely unsafe as a basis

linson v. Derby, 43 Conn. 562; Baldwin v. Western R. Co., 4 Gray, 333; Jacques v. Bridgeport Horse R. Co., 41 Conn. 61, 19 Am. Rep. 483; Rockwell v. Third Avenue R. Co., 64 Barb. 438, 53 N. Y. 625; Wade v. Leroy, 20 How. 34; Potter v. Metropolitan R. Co., 28 L. T. (N. S.) 735; Ingram v. Lawson, 6 Bing. N. C. 212; Ripon v. Bittel, 30 Wis. 614, 617; Goodno v. Oshkosh, 28 id. 300; Rio Grande Western R. Co. v. Rubenstein, 5 Colo. App. 121, 38 Pac. Rep. 76; Atlanta Consolidated Street R. Co. v. Beauchamp, 93 Ga. 6, 19 S. E. Rep. 24; Broyles v. Prisock, 97 Ga. 643, 25 S. E. Rep. 389; Atlanta Consolidated Street R. Co. v. Bates, 103 Ga. 333, 30 S. E. Rep. 41; Atchison, etc. R. Co. v. Chance, 57 Kan. 40, 45 Pac. Rep. 60; Chicago, etc. R. Co. v. Posten, 59 Kan. 449, 53 Pac. Rep. 465; Hickey v. New York Central, etc. R. Co., 8 App. Div. 123, 40 N. Y. Supp. 484; Grinnell v. Taylor, 85 Hun, 85, 92, 32 N. Y. Supp. 684; Quinn v. O'Keefe, 9 App. Div. 68, 75, 41 N. Y. Supp. 116; Thomas v. Union R. Co., 18 App. Div. 185, 45 N. Y. Supp. 920; Wynne v. Atlantic Avenue R. Co., 14 N. Y. Misc. 394, 35 N. Y. Supp. 1034; Galveston, etc. R. Co. v. Cooper, 2 Tex. Civ. App. 42, 48, 20 S. W. Rep. 990, citing the text; Illinois Central R. Co. v. Davidson, 76 Fed. Rep. 517, 22 C. C. A. 306; Chicago, etc. R. Co. v. Scheinkoenig, 62 Kan. 57, 61 Pac. Rep. 414.

[1] Ehrgott v. Mayor, 96 N. Y. 264, 48 Am. Rep. 622; Waldie v. Brooklyn Heights R. Co., 78 App. Div. 557, 79 N. Y. Supp. 922; Simoni v. New York, etc. R. Co., 36 Hun, 214; Parshall v. Minneapolis, etc. R. Co., 35 Fed. Rep. 649; Wallace v. Pennsylvania R. Co., 195 Pa. 127, 45 Atl. Rep. 685, limiting observations made in Goodhart v. Same, 177 Pa. 1, 35 Atl. Rep. 191, 55 Am. St. 705; Aiken v. Philadelphia, 9 Pa. Super. Ct. 502; Markowitz v. Metropolitan Street R. Co., 31 N. Y. Misc. 175, 63 N. Y. Supp. 961.

One who fishes for a living may recover for the loss of his time. Lund v. Tyler, 115 Iowa, 236, 88 N. W. Rep. 333.

[2] Masterson v. Mount Vernon, 58 N. Y. 391; Marks v. Long Island R. Co., 14 Daly, 61; Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 11 N. W. Rep. 514, 41 Am. Rep. 19; Hewlett v. Brooklyn Heights R. Co., 63 App. Div. 423, 71 N. Y. Supp. 531; Chicago, etc. R. Co. v. Posten, 59 Kan. 449, 53 Pac. Rep. 465; Blute v. Third Avenue R. Co., 29 App. Div. 388, 51 N. Y. Supp. 590; Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 15, 35 Atl. Rep. 191, 55 Am. St. 705; Lombardi v. California Street R. Co., 124 Cal. 311, 57 Pac. Rep. 66; Silsby v. Michigan Car Co., 95 Mich. 204, 54 N. W. Rep. 761; Pryor v. Metropolitan Street R. Co., 85 Mo. App. 367, 372; Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 15 Sup. Ct. Rep. 830. See Pill v. Brooklyn Heights R. Co., 6 N. Y. Misc. 267, 27 N. Y. Supp. 230.

In Heer v. Warren-Scharf Asphalt Paving Co., — Wis. —, 94 N. W. Rep. 789, it was held, by a majority of

upon which to compute compensation for future disability. It has been said that "in no case has it been permitted, where the profits of business arise from the investment of capital, that evidence of such profits should be offered for the purpose of enhancing damages. It is only in cases where the earnings proceed entirely from the plaintiff's labor that the evidence" of them becomes admissible.[1] In the former class of cases the recovery must be based on the value of the plaintiff's services in conducting the business with which he was connected.[2]

Where the earnings of the plaintiff have been the reward of his personal skill, the proof that future earnings will correspond to those previously received need not be very cogent in order that an award of damages, based on past earnings, may be sustained. In Phillips v. London, etc. R. Co., the plaintiff, a physician with a lucrative practice, as well as with a considerable income independently of it, recovered a verdict

the court, proper for a merchant who was suing to recover for personal injuries to show the average annual profits of his business for ten years prior to his injury. Numerous cases are cited to show that it is competent for the plaintiff to prove his capacity to labor before his injury, and if his work consisted in the management of a business, the character and magnitude thereof; "not that the jury is to allow any loss of such profits as damages, but to consider them, with other elements, as descriptive of the amount and grade of the services of which the injured man was capable. When that is ascertained the jurymen are to apply their judgment and common knowledge in deciding what money-earning capacity results from the ability to render such services." The holding of the court is probably not to be taken as favoring the view that the loss of earning capacity was to be measured by the profits made in the plaintiff's business, it being said in the opinion that the jury were not authorized to allow any damage by reason of lost or diminished profits, but merely for loss of earnings, and the verdict was taken as not having been rested on the evidence concerning loss of profits. The dissenting opinion of Marshall, J., is valuable because of the collection of authorities and the vigor of the argument. The significance of the ruling lies in the fact that no other evidence than that indicated was before the jury as a basis upon which to assess damages for the plaintiff's future disability. Where the action is to recover for past disability only, the objections to such testimony are much less weighty, and may not exist in many cases.

[1] Johnson v. Manhattan R. Co., 52 Hun. 111, 4 N. Y. Supp. 848. See People's Passenger R. Co. v. Lauderbach, 4 Penny. (Pa.) 406.

[2] Lombardi v. California Street R. Co., Silsby v. Michigan Car Co., Pryor v. Metropolitan Street R. Co., *supra*.

for 7,000*l.*, which was set aside and a new trial granted on the ground that the award was insufficient.[1] On a retrial the verdict was for 16,000*l.*, and was sustained. One of the principal elements of damage was the inability of the plaintiff to pursue his profession. For three years preceding the accident his net earnings had been about 5,000*l.* a year. It was contended that because of peculiar circumstances, which the following quotation from the summing up of Lord Coleridge, C. J., will disclose the nature of, that such earnings could not be considered in estimating damages. "But then it is said that is too much, because some of these are large payments which have come from nine clients, and in the nature of things it is not likely that these sums will recur. This 1,300*l.* from one person in three years, that 400*l.* from another in two years, and nearly 500*l.* from another in three, all these and other sums are not likely to recur. I do not see at all why the confidence of the gentlemen who made these large payments should diminish, or their generosity either, and I do not quite see why, in the class of patients this gentleman had, people who send 1,000*l.*, and 500*l.*, and so on (5,000*l.* in one case) to their doctor, without inquiry, to pay for the number of visits that had been made. I do not see why the same gentleman should not pay 5,000*l.* over again. . . . It is a lucky thing, if Dr. Phillips should recover, that his practice is among patients who do not care about money. I do not really see why these should be the only people in the world who do these things, and who will continue to do them, and why, if they cease to do so, they should not be succeeded by others equally generous; but you must give it such weight as you think fit." The court of appeal did not find anything in these observations which authorized it to interfere with the judgment.[2]

It is said in an Iowa case[3] that the damages for future disability are to be measured by the facts as they exist at the time the injury is sustained. This observation was not called for by the question before the court, which involved the admissibility of evidence to show that the plaintiff was in the line of promotion, and that if promoted his earnings would be in-

[1] 4 Q. B. Div. 406, 5 id. 78.
[2] 42 L. T. Rep. 6.
[3] Brown v. Chicago, etc. R. Co., 64 Iowa, 652, 21 N. W. Rep. 193.

creased. Such evidence was not proper.[1] The same court has held that the capacity of the plaintiff to earn money is not to be measured by the employment he is engaged in at time his right of action accrues; it is competent for him to show that he was able to earn more money at some other calling.[2] In Texas a request to give an instruction which ignored the plaintiff's power to acquire, but for the wrong done him, the mental or physical capacity to do more profitable work than he was able to do at the time, was held to have been properly refused.[3] But in order that this question shall be considered by the jury there must be some evidence,[4] as that the plaintiff was fitting himself for a particular vocation for which the injury incapacitated him.[5] He may show that he was competent to earn more money than he was earning when injured.[6] Damages cannot be recovered because the disability bars the plaintiff from following a particular pursuit, aside from his vocation, unless he had earned money therein.[7] The possibility that an injured person who is disabled from performing manual labor may engage in intellectual pursuits and thereby increase his earnings does not affect his right to recover for diminished earning power in his chosen calling.[8] Where the leader of a theatrical troupe was injured on a train upon which the troupe was traveling the damage included the cost of maintaining himself and the troupe while he was disabled, the wages he paid, and the value of the time he lost.[9] The allowance for loss of time must be limited to that for which the defendant was responsible. If illness followed the injury, and was not caused by it, there cannot be a recovery for loss

[1] Richmond & D. R. Co. v. Allison, 86 Ga. 145, 12 S. E. Rep. 352.

[2] Rayburn v. Central Iowa R. Co., 74 Iowa, 637, 34 N. W. Rep. 621; Trott v. Chicago, etc. R. Co., 115 Iowa, 80, 86 N. W. Rep. 33.

[3] Houston, etc. R. Co. v. Boehm, 57 Tex. 152; Union Pacific R. Co. v. Young, 19 Kan. 488.

[4] Gulf, etc. R. Co. v. Gordon, 70 Tex. 80, 7 S. W. Rep. 695.

[5] Howard Oil Co. v. Davis, 76 Tex. 630, 13 S. W. Rep. 665.

[6] Chicago, etc. R. Co. v. Long, 26 Tex. Civ. App. 601, 65 S. W. Rep. 882.

[7] Freeland v. Brooklyn Heights R. Co., 54 App. Div. 90, 66 N. Y. Supp. 321; Atchison, etc. R. Co. v. Chance, 57 Kan. 40, 45 Pac. Rep. 60.

[8] Ostrander v. Lansing, 115 Mich. 224, 73 N. W. Rep. 110. Compare Laird v. Chicago, etc. R. Co., 100 Iowa, 336, 69 N. W. Rep. 414.

[9] Southern R. Co. v. Myers, 87 Fed. Rep. 149, 32 C. C. A. 19.

of time resulting therefrom.[1] The damages recoverable under these heads do not include injury to the plaintiff's professional reputation or the impairment of his social standing.[2] It is not sufficient reason for denying a recovery for loss of profits from a special contract made by the plaintiff with the proprietor of a theatre to perform as "a burlesque opera buffe artist," that such performance required the artist to "show her limbs in silk stockings." The rights of those who earn their living in that way cannot be outlawed.[3] The possibility of the loss of earning power by a married woman in case she survives her husband is too remote a contingency to be considered in awarding her damages for a personal injury.[4] Minors and married women whose only occupation is that of housekeeping, and whose time belongs to their parents or husbands, cannot recover for loss of earning capacity;[5] but a child of ten years has been held entitled to recover for such loss.[6] The rule that the damages recoverable should not exceed the amount upon which the legal interest would equal the value of the injured party's past and probable future earnings has no application to a plaintiff suing for an injury to himself; it is only applied in actions to recover for the death of the party injured.[7] The expense necessarily incurred by a disabled person in procuring competent help to carry on his business and do the which work would have been performed by himself but for the disability may be recovered.[8]

§ **1247. Same subject; pleading.** Loss of earnings is a kind of damage which is not regarded as a necessary consequence of such acts as are usually involved in actions to re-

[1] Atchison, etc. R. Co. v. Rowe, 56 Kan. 411, 43 Pac. Rep. 683.

[2] Schmitt v. Milwaukee St. R. Co., 89 Wis. 195, 61 N. W. Rep. 834.

[3] Baumeister v. Markham, 101 Ky. 122, 141, 39 S. W. Rep. 844, 41 id. 816, 72 Am. St. 397.

[4] Johnston v. New York & L. B. R. Co., 65 N. J. L. 421, 47 Atl. Rep. 586.

[5] See § 1249.

[6] Delaware, etc. R. Co. v. Devore, 114 Fed. Rep. 155, 52 C. C. A. 77.

[7] Morgan v. Southern Pacific Co., 95 Cal. 501, 30 Pac. Rep. 601, 17 L. R. A. 71; Morrison v. Long Island R. Co., 3 App. Div. 205, 38 N. Y. Supp. 393; Gregory v. New York, etc. R. Co., 55 Hun, 303, 8 N. Y. Supp. 525. See Rooney v. New York, etc. R. Co., 173 Mass. 222, 53 N. E. Rep. 435; Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 35 Atl. Rep. 191, 55 Am. St. 705.

[8] North Chicago Street R. Co. v. Zeiger, 182 Ill. 9, 54 N. E. Rep. 1006, 74 Am. St. 157, 78 Ill. App. 463; Ashcraft v. Chapman, 38 Conn. 230.

cover for personal injuries, and is not generally covered by the usual allegation of damages.[1] The adjudications are not in accord as to the particularity with which such loss must be pleaded. An allegation that the plaintiff was injured to such extent as to cause great pain and suffering states an impairment of the general capacity of the plaintiff to labor;[2] and so of an allegation that the plaintiff has been deprived of the means of his support.[3] A general allegation of permanent disability to labor by reason of the injuries complained of embraces such a claim for damages.[4] In the case of a crippled minor damages may be recovered for the impairment of his capacity to earn a livelihood after he shall attain his majority though no specific allegation is made as to his inability to do so.[5] The *quantum* of damage arising from the loss of earnings need not be alleged.[6] Under an averment that the plaintiff has been prevented from attending to his usual business, and from earning and receiving large gains and profits, evidence to show his income before and after the injury is proper, so far as that was not affected by any special engagement.[7] Proof of the loss of earnings may be made under an allegation that the plaintiff was compelled to remain away from his business for six weeks, deprived of the use of his foot and otherwise injured.[8] It is probably necessary to state any particular

[1] Mellor v. Missouri Pacific R. Co., 105 Mo. 455, 464, 16 S. W. Rep. 849, 10 L. R. A. 36; Pryor v. Metropolitan Street R. Co., 85 Mo. App. 367; Paquin v. St. Louis & S. R. Co., 90 Mo. App. 118, 128; Krueger v. Chicago & A. R. Co., 94 id. 458, 68 S. W. Rep. 220.

[2] Hamilton v. Great Falls Street R. Co., 17 Mont. 334, 352, 42 Pac. Rep. 860, 43 id. 713; Koehne v. New York, etc. R. Co., 32 App. 419, 52 N. Y. Supp. 1088.

[3] Smith v. Chicago & A. R. Co., 119 Mo. 246, 23 S. W. Rep. 784.

[4] Bartley v. Frorlicht, 49 Mo. App. 214; Frobisher v. Fifth Avenue Transportation Co., 81 Hun, 544, 30 N. Y. Supp. 1099; Mabrey v. Cape Girardeau & Gravel Road Co., 92 Mo. App. 596.

[5] Schmitz v. St. Louis, etc. R. Co., 119 Mo. 256, 24 S. W. Rep. 472, 23 L. R. A. 250.

[6] Gerdes v. Christopher & S. Architectural Iron & F. Co., 124 Mo. 347, 369, 25 S. W. Rep. 557; Cooney v. Southern Electric R. Co., 80 Mo. App. 226; Marbrey v. Cape Girardeau, etc. Co., *supra*.

[7] Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. Rep. 290; North Chicago Street R. Co. v. Brown, 178 Ill. 187, 52 N. E. Rep. 864; Illinois Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. Rep. 734.

[8] Carples v. New York & H. R. Co., 16 App. Div. 158, 44 N. Y. Supp. 670; Doherty v. Lord, 8 N. Y. Misc. 227, 28 N. Y. Supp. 1143. See Gurley v. Missouri Pacific R. Co., 122 Mo. 141, 26 S. W. Rep. 953; Russell v. Metropolitan Street R. Co., 35 N. Y. Misc. 293,

facts in the condition of the plaintiff which would afford a more precise measure or evidence of his loss than his general ability to earn money.[1] The fact that the injury disabled the plaintiff at the best season of the year for the practice of his specialty must be specially alleged.[2] In a Connecticut case,[3] under the general allegation that in consequence of the injury the plaintiff was "prevented from attending to his ordinary business," it was held that evidence that he was at the time of the injury earning $100 a month in carting and sawing timber was inadmissible. In another case[4] it was held, under a like averment, that the plaintiff could not show any particular employment requiring special skill and training.[5] This case

71 N. Y. Supp. 765; Atlanta Street R. Co. v. Jacobs, 88 Ga. 647, 15 S. E. Rep. 825.

[1] Fuller v. Bowker, 11 Mich. 204; Silsby v. Michigan Car Co., 95 Mich. 204, 54 N. W. Rep. 761; Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. Rep. 290; North Chicago Street R. Co. v. Barber, 77 Ill. App. 257. See Buckbee v. Third Avenue R. Co., 64 App. Div. 360, 72 N. Y. Supp. 217.

In the absence of a specific and direct averment that the plaintiff was a practicing physician and of the amount of damages sustained by the loss of his practice, if it is inferentially stated that he was such, and the petition counts specially on his loss of earnings as a physician, that element of damage is well pleaded. Mason v. St. Louis, etc. R. Co., 75 Mo. App. 1.

Under an allegation of special damages showing only loss of commissions from the plaintiff's employer at the time of the injury, he being the successor of a company for which the plaintiff had previously worked in the same capacity and under the same contract, evidence of his earnings while so employed is admissible. Illinois Central R. Co. v. Davidson, 76 Fed. Rep. 517, 22 C. C. A. 306.

It is said in Southern Pacific Co. v. Hall, 100 Fed. Rep. 760, 41 C. C. A. 50, 54, that an allegation that the plaintiff has been wholly deprived of earning wages by manual labor for his support was sufficient to admit evidence that he was a carpenter by trade and had been engaged in mining. "Moreover, in actions for personal injuries, the plaintiff, although there is no specific averment in his complaint as to his previous trade or calling, may introduce testimony as to what his business or occupation was, as such evidence is always material and pertinent upon the question of damages."

[2] Louisville & N. R. Co. v. Reynolds, 71 S. W. Rep. 516 (Ky.).

[3] Tomlinson v. Derby, 43 Conn. 562, approved, *arguendo*, in Luessen v. Oshkosh Electric Light & P. Co., 109 Wis. 94, 85 N. W. Rep. 124.

[4] Taylor v. Monroe, 43 Conn. 36.

[5] Citing 2 Greenlf. Ev., § 254; 1 Chitty's Pl. (4th ed.) 328, 346; Bristol Manuf. Co. v. Gridley, 28 Conn. 201; Squier v. Gould, 14 Wend. 159; Baldwin v. Western R. Co., 4 Gray, 333. The Connecticut cases cited, also the Massachusetts case and the New York case are followed in Fitchburg R. Co. v. Donnelly, 87 Fed. Rep. 135, 30 C. C. A. 580. Wabash Western R. Co. v. Friedman, 146 Ill. 583, 30 N. E. Rep.

and Baldwin v. Western R. Co. would seem to be in conflict with the numerous cases which hold that the injured party may show the nature and extent of the business he had been accustomed to do.[1] If the petition claims damages for loss of time because of permanent disability, the plaintiff may prove his skill as a mechanic, the employment he was engaged in and the wages received, though such facts were not alleged.[2] But under an allegation that the plaintiff was an operator in a mill evidence of her ability to earn money as an accompanist on the piano is not relevant to show the extent of the injury.[3] If the nature of the plaintiff's trade has "been specially stated and the effect also upon his ability to pursue it of the injuries received, nothing more was required to justify proof of the extent to which he was thus specially damaged, and in showing that it was proper to inquire what wages pattern-makers customarily receive for the best-paying kind of work in that trade, and that he had previously been able and accustomed to do such work, but could no longer."[4] In Minnesota under a general allegation of damages proof may be made of the wages the plaintiff received before and after the injury, and that he received no more before and no less after than he was able to earn.[5]

In Luck v. Ripon[6] objection was made on two grounds to proof of damage for injury to a woman in consequence of which

353, 34 id. 1111, is in accord with the cases cited.

Under an allegation that the plaintiff was greatly hindered and prevented from doing and performing his work and business and looking after and attending to his necessary affairs at home, there cannot be a recovery for the loss of hay ungathered because help could not be obtained to secure it. Heiser v. Loomis, 47 Mich. 16, 10 N. W. Rep. 60.

[1] See § 1246, n.; Moore v. Kalamazoo, 109 Mich. 176, 66 N. W. Rep. 1089.

[2] Flanagan v. Baltimore & O. R. Co., 83 Iowa, 639, 50 N. W. Rep. 60; Lesser v. St. Louis & S. R. Co., 85 Mo. App. 326.

[3] Morris v. Winchester Repeating Arms Co., 73 Conn. 680, 694, 49 Atl. Rep. 180.

[4] Finken v. Elm City Brass Co., 73 Conn. 423, 47 Atl. Rep. 670.

[5] Palmer v. Winona R. & L. Co., 78 Minn. 138, 80 N. W. Rep. 869, 83 Minn. 85, 85 N. W. Rep. 941.

[6] 52 Wis. 196, 8 N. W. Rep. 815.

An employee who has sustained injury through the negligence of his employer may recover on account of pain, physical injury and decreased power to labor, although no proof has been made of the value of his services in any capacity. Georgia Southern R. Co. v. Neel, 68 Ga. 609; Augusta v. Owens, 111 Ga. 464, 36 S. E. Rep. 830.

she was unable to pursue her business of midwife: first, that the complaint failed to set out what the particular business of the plaintiff was; and second, she was not qualified to prac- [718] tice "physic and surgery" so as to recover compensation for her services as such under a statute. Taylor, J., for the court, said of the first objection: "When the complaint states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business and damages are claimed for loss of time in such business, the plaintiff should be permitted to show upon the trial what his business is and what damages he has suffered by reason of inability to pursue the same. Ordinarily the business of the plaintiff will be known to the defendant and he will not be surprised at the introduction of evidence upon that subject. If, however, the defendant has no knowledge of such business and desires to be informed thereof in order to be prepared for trial, he must move to make the complaint more definite and certain in that particular. He will not be justified in lying by until the trial and then claiming that he is unable to meet that issue for want of notice."[1] Of the second objection he said: "Without discussing the question whether a female who practices the business of a midwife is practicing 'physic or surgery' within the meaning of said section, it is sufficient answer to the objection, . . . first, that in this action the plaintiff is not seeking to recover any compensation for her services as a midwife; and second, that the statute does not make it unlawful to practice either physic or surgery without having a diploma. In pursuing her business as a midwife the plaintiff was violating no law of this state, but was pursuing a lawful and laudable business. If she earned and received money for her services, she had a perfect right to such money. If her injuries deprived her of the income she derived from such lawful employment, there does not seem to be any more reason for saying she has not been damaged by her injury to the extent she has been deprived of such income than there would be for saying that she had not been damaged if she had been

[1] Columbia, etc. R. Co. v. Hawthorne, 3 Wash. Ty. 353, 19 Pac. Rep. 25; Flanagan v. Baltimore & O. R. Co., 83 Iowa, 639, 50 N. W. Rep. 60; Frobisher v. Fifth Avenue Transportation Co., 81 Hun, 544, 30 N. Y. Supp. 1099.

deprived of an income as a teacher, artist, seamstress, or in any other lawful employment. The income of most men and women, whether professional or otherwise, does not depend in any great measure on the fact that they can enforce payment for services rendered by an action at law, but rather upon that sense of justice which in most men is more potent than the constraints of the law, that the laborer is worthy of his hire. It does not follow by any means that a man will not [719] have any income in the pursuit of a lawful employment because he cannot enforce his claim to compensation for services by an action at law."[1] It is necessary to allege the permanency of the injuries if a recovery is sought because of prospective loss of time.[2]

§ **1248. Same subject; evidence.** All evidence tending to show the character of the plaintiff's ordinary pursuits and the extent to which the injury has and will prevent him from following them is admissible.[3] He may show that he was sober and industrious.[4] The defendant may show that the medical practice of the plaintiff was reputed to be unlawful and that his professional reputation was not good.[5] Under an allegation of diminished capacity to labor one who has testified that he had become unable to do in person all his work may also

[1] Holmes v. Halde, 74 Me. 28, 43 Am. Rep. 567; Phillips v. London, etc. R. Co., 42 L. T. Rep. 6; McNamara v. Clintonville, 62 Wis. 207, 22 N. W. Rep. 472.

[2] Scott v. Chicago Great Western R. Co., 113 Iowa, 381, 85 N. W. Rep. 631.

[3] District of Columbia v. Woodbury, 136 U. S. 450, 459, 10 Sup. Ct. Rep. 990, 993.

[4] Metropolitan Street R. Co. v. Kennedy, 82 Fed. Rep. 158, 27 C. C. A. 136; Texas Mexican R. Co. v. Douglas, 73 Tex. 325, 11 S. W. Rep. 333.

[5] Jacques v. Bridgeport Horse R. Co., 41 Conn. 6, 19 Am. Rep. 483.

This ruling is open to objection. The injured party would not lose his right to compensation for being prevented by his injury from pursuing his practice merely because it was "claimed" or reported that his practice was unlawful. Reputation is not proof that in fact one's practice is unlawful, nor was it legitimate proof to controvert the plaintiff's evidence of the amount that practice had yielded.

In Baldwin v. Western R. Co., 4 Gray, 335, it was held that testimony that the person who was driving the carriage in which the plaintiff rode at the time of the accident, by common reputation, was a careless driver, was rightly rejected. It might have been competent for the defendant to show that he was in fact unskilful and careless. But evidence on this point must come from those who can testify to the fact from their own knowledge. It cannot be proved by reputation.

testify as to the cost of help employed by him; such evidence tends to show decreased ability and the extent thereof.[1] Where there is claimed to be a permanent disability or decrease of mental or physical capacity for work evidence should be given which will enable the jury to determine whether the injury is permanent, the health and condition of the plaintiff before, as compared with his health consequent upon, the injury; or how far and for what time it is calculated to have a disabling effect.[2] The duration of the capacity and ability to labor may be ascertained by the usual mode of computing the probable length of life; but the proof must be taken subject to the conditions surrounding the plaintiff. Hence the existence of disease tending to shorten life may be shown, and it must also be borne in mind that the mortality tables show the merely probable continuance of life, not the duration of the ability to work or earn money in old age.[3] In considering the exent of disability regard must be had to all avenues of occupation open to the plaintiff, intellectual as well as physical;[4] to his earning capacity as it may be aided by the use of an artificial limb,[5] and to his earnings since the injury.[6] The de-

[1] Macon Consolidated Street R. Co. v. Barnes, 113 Ga. 212, 38 S. E. Rep. 756.

[2] Alabama, etc. R. Co. v. Yarbrough, 83 Ala. 238, 3 So. Rep. 447, 3 Am. St. 715; Joliet v. Conway, 119 Ill. 489, 10 N. E. Rep. 223; Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589, 24 N. W. Rep. 675; McMahon v. Northern Central R. Co., 39 Md. 438; Ballou v. Farnum, 11 Allen, 73; Lincoln v. Saratoga, etc. R. Co., 23 Wend. 425; Tefft v. Wilcox, 6 Kan. 46; Kansas Pacific R. Co. v. Painter, 9 Kan. 620; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 723; Tomlinson v. Derby, 43 Conn. 562; Luck v. Ripon, 52 Wis. 196, 8 N. W. Rep. 815; Jacques v. Bridgeport Horse R. Co., 41 Conn. 61, 19 Am. Rep. 483; Cleveland, etc. R. Co. v. Sutherland, 19 Ohio St. 151; George v. Haverhill, 110 Mass. 506; Brooks v. Rochester R. Co., 10 N. Y. Misc. 88, 31 N. Y. Supp. 179; Wallace v. Pennsylvania R. Co., 195 Pa. 127, 45 Atl. Rep. 685; Waters v. Atlantic Refining Co., 9 Pa. Dist. Rep. 473; Galveston, etc. R. Co. v. Cooper, 2 Tex. Civ. App. 42, 48, 20 S. W. Rep. 990; Southern Pacific Co. v. Hall, 100 Fed. Rep. 760, 41 C. C. A. 50; Denver v. Sherret, 88 Fed. Rep. 226, 31 C. C. A. 499, 509.

[3] Greer v. Louisville & N. R. Co., 94 Ky. 169, 177, 21 S. W. Rep. 649, 42 Am. St. 345.

[4] Laird v. Chicago, etc. R. Co., 100 Iowa, 336, 69 N. W. Rep. 414.

[5] Hamilton v. Pittsburgh, etc. R. Co., 104 Ill. App. 207.

[6] Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 16, 35 Atl. Rep. 191, 55 Am. St. 705; Linton Coal & M. Co. v. Persons, 11 Ind. App. 264, 39 N. E. Rep. 214, 15 Ind. App. 69, 43 N. E. Rep. 651; Birkel v. Chandler, 26 Wash. 241, 66 Pac. Rep. 406.

fendant cannot show, after the plaintiff has given evidence of the difference between his earnings before and after the injury, that such difference would have been less if the plaintiff had been employed elsewhere.[1]

The question of earning power is not one for expert testimony. "An expert in banking or merchandising might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of the injury. In settling this question they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living.[2] The basis on which this calculation must rest is not the possibility as judged by the expert witness but the cold commonplace facts as proved by those who knew them. It does not follow, as a necessary conclusion, that the services of the plaintiff were worth no more at the time of his injury than the sum he was receiving, but the fact that he accepted service at that price was an important one, and was persuasive, though not conclusive, evidence that the price was considered by himself a fair one."[3] If the injury is a broken limb an X-ray photograph, properly taken and shown to be an accurate representation of the condition of the injured member, is competent evidence.[4] Where the injury has resulted in the loss of an arm or other severe physical disability no effect will be given to an exception based upon the absence of proof of impaired physical ability, the plaintiff having been engaged in manual labor;[5] and so in the case of a permanently injured infant.[6] Where a boy, whose earnings had been those of a messenger, was per-

[1] Omaha, etc. R. Co. v. Ryburn, 40 Neb. 87, 58 N. W. Rep. 541.

[2] McHugh v. Schlosser, 159 Pa. 480, 28 Atl. Rep. 291, 39 Am. St. 699, 23 L. R. A. 574.

[3] Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 16, 35 Atl. Rep. 191, 55 Am. St. 705.

[4] Bruce v. Beall, 99 Tenn. 303, 41 S. W. Rep. 445. See § 454.

[5] Chicago, etc. R. Co. v. Warner, 108 Ill. 538; Fisher v. Jansen, 30 Ill. App. 91, 128 Ill. 549, 21 N. E. Rep. 598; Schmitz v. St. Louis, etc. R. Co., 55 Mo. App. 576; De La Vergne Refrigerating Machine Co. v. Stahl, 24 Tex. Civ. App. 471, 60 S. W. Rep. 319.

[6] Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. Rep. 616.

manently disabled, it was not improper to charge that his loss of earnings must be estimated, the only evidence on that point being his age. In such a case there could be no proof which would approximate his earnings as a man.[1] If circumstances have been testified to from which the jury could form opinions as to the age, probable duration of life, or the value of the labor of the plaintiff either before or after the injury, the fact that no proof showing these facts was made does not prevent a recovery.[2] The plaintiff may show, as bearing upon the question of damages, that he had learned no business or trade, had no education, and could not do office work.[3]

In many cases where a claim is made for loss of time only a nominal sum can be recovered if the plaintiff does not prove the value of the time lost or facts upon which an estimate of its worth can be made.[4] But in the case of an ordinary laborer the jurors may be presumed to be reasonably familiar with the value of his services, and may measure it by their knowledge and experience.[5] The same rule has been applied to the value of the services of a nurse,[6] and to the earnings of a peddler who supported his family thereby.[7] The opinions of witnesses as to what the plaintiff might have earned in vocations in which he had not engaged are not admissible.[8] In case of injury to one who was a member of a partnership, evidence as to the value of his services to the firm before the injury and of the amount agreed upon by him and his copartners as their value thereafter is not admissible. That is not a proper way of showing the plaintiff's diminished earning capacity.[9] In Iowa

[1] Baker v. Irish, 172 Pa. 528, 33 Atl. Rep. 558.

[2] Gainesville, etc. R. Co. v. Lacy, 86 Tex. 244, 24 S. W. Rep. 269.

[3] McCoy v. Milwaukee Street R. Co., 88 Wis. 56, 59 N. W. Rep. 453; Helton v. Alabama Midland R. Co., 97 Ala. 275, 12 So. Rep. 276.

[4] Leeds v. Metropolitan Gas Light Co., 90 N. Y. 26; Staal v. Grand Street & N. R. Co., 107 id. 625, 13 N. E. Rep. 624; McKenna v. Citizens' Natural Gas Co., 198 Pa. 31, 47 Atl. Rep. 990; Niendorff v. Manhattan R. Co., 4 App. Div. 46, 38 N. Y. Supp. 690; Mammerberg v. Metropolitan Street R. Co., 62 Mo. App. 563; Saperstone v. Rochester R. Co., 25 App. Div. 285, 49 N. Y. Supp. 486; Britton v. Street R. Co., 90 Mich. 159, 51 N. W. Rep. 276.

[5] Loe v. Chicago, etc. R. Co., 57 Mo. App. 350.

[6] Murray v. Missouri Pacific R. Co., 101 Mo. 236, 13 S. W. Rep. 817, 20 Am. St. 601.

[7] Fernstein v. Jacobs, 15 N. Y. Misc. 474, 37 N. Y. Supp. 345. See Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766.

[8] Atchison, etc. R. Co. v. Chance, 57 Kan. 40, 45 Pac. Rep. 60.

[9] Mt. Adams, etc. R. Co. v. Isaacs, 18 Ohio Ct. Ct. 177.

a person permanently disabled may show that he has no means of support except such as he earned.[1] The better rule is otherwise.[2] An injured tradesman may show how long he has followed his trade and the wages he had earned each year, though they were on a paper basis part of the time.[3] The plaintiff may prove his average monthly earnings before and after the injury was sustained.[4] Testimony as to the wages received for five years prior to within a few months of the time the injury was inflicted is not too remote.[5] But it is otherwise where the plaintiff was, five years before his injury, engaged in an occupation much more remunerative than that he was subsequently employed in, there being no evidence to show that he had in view or prospect a similar occupation.[6] If the services of the plaintiff had a market value in the kind of business in which he was engaged the fact may be proved, although he had not actually worked for others, but had been engaged in business on his own account.[7] He may show that his contract of employment provided for an increase of salary in a short time if his work proved satisfactory,[8] and what wages would have been open to him in a business he understood, though he had not engaged in it for three years, the right and ability to resume it being his.[9] It is not competent to show how much he might have made by trading.[10] But in Texas the plaintiff may state what his time would have been reasonably worth if he had been in his usual health.[11] The defendant may prove any facts concerning the plaintiff's habits or conduct which may throw light on the probability of his securing employ-

[1] Stafford v. Oskaloosa, 64 Iowa, 251, 20 N. W. Rep. 174; Yeager v. Spirit Lake, 115 Iowa, 593, 88 N. W. Rep. 1095; Hunt v. Chicago, etc. R. Co., 26 Iowa, 363; Moore v. Central R., 47 id. 689.

[2] Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. Rep. 389. See § 1254.

[3] Finken v. Elm City Brass Co., 73 Conn. 421, 47 Atl. Rep. 670.

[4] Murdock v. New York & B. Despatch Exp. Co., 167 Mass. 549, 46 N. E. Rep. 57; Paul v. Omaha & St. L. R. Co., 82 Mo. App. 500; Symons v. Metropolitan Street R. Co., 27 N. Y. Misc. 502, 58 N. Y. Supp. 327.

[5] Sias v. Reed City, 103 Mich. 312, 61 N. W. Rep. 502.

[6] Houston & T. Central R. Co. v. Gee, 27 Tex. Civ. App. 414, 66 S. W. Rep. 78.

[7] Harmon v. Old Colony R. Co., 168 Mass. 377, 47 N. E. Rep. 100, 30 L. R. A. 658; Matteson v. New York Central R. Co., 35 N. Y. 487, 493, 91 Am. Dec. 67.

[8] Bryant v. Omaha, etc. R. & B. Co., 98 Iowa, 483, 67 N. W. Rep. 392.

[9] Peterson v. Seattle Traction Co., 23 Wash. 615, 643, 63 Pac. Rep. 539.

[10] Wilkie v. Railroad, 128 N. C. 113, 38 S. E. Rep. 289.

[11] Gulf, etc. R. Co. v. Bell, 24 Tex. Civ. App. 579, 594, 58 S. W. Rep. 614.

ment and the character and continuity of the same; but cannot go into proof of the plaintiff's character or repute.[1]

[720] **§ 1249. Same subject; measure of recovery.** The recovery for loss of time or decreased capacity for work will depend on the nature of the business or calling of the injured party, or the pecuniary value of his lost time, or of lost or diminished capacity.[2] The measure of damages is not the market value of the average wages of a man of the plaintiff's capacity working in the same employment; but the difference in the value of what he earned before the injury, the wages then paid him being reasonable, and what he was able to earn thereafter.[3] A minor owing service to his father cannot recover for loss of time or inability to labor or earn money during the period of minority.[4] But if no claim was made by the

[1] Kingston v. Fort Wayne & E. R. Co., 112 Mich. 40, 70 N. W. Rep. 315, 74 id. 230, 40 L. R. A. 131.

[2] Chicago v. Elzeman, 71 Ill. 131; McLaughlin v. Corry, 77 Pa. 109, 18 Am. Rep. 432; Hammond v. Mukwa, 40 Wis. 36; Hall v. Fond du Lac, 42 id. 274; Indianapolis v. Gaston, 58 Ind. 224; Pennsylvania R. Co. v. Dale, 76 Pa. 47; Morris v. Chicago, etc. R. Co., 45 Iowa, 29; Chicago v. Jones, 66 Ill. 349; Chicago v. Langlass, id. 361; Nichols v. Brunswick, 3 Cliff. 81; Lombard v. Chicago, 4 Biss. 460; Gale v. New York, etc. R. Co., 13 Hun, 1; Howes v. Ashfield, 99 Mass. 540; Peppercorn v. Black River Falls, 89 Wis. 38, 61 N. W. Rep. 79, 46 Am. St. 818. See § 1246.

[3] Braithwaite v. Hall, 168 Mass. 38, 46 N. E. Rep. 398. See Noel v. Redruth Foundry Co., [1896] 1 Q. B. 453, for the rule under the employers' liability act, 1880.

[4] Stewart v. Ripon, 38 Wis. 584; Jordan v. Bowen, 46 N. Y. Super. Ct. 355; G., C. & S. F. R. Co. v. Evansich, 63 Tex. 54; Texas & P. R. Co. v. Morin, 66 id. 225; Swift v. Holoubek, 55 Neb. 228, 75 N. W. Rep. 584; Clark Mile-End Spool Cotton Co. v. Shaffery, 58 N. J. L. 229, 33 Atl. Rep. 284; Gulf, etc. R. Co. v. Johnson, 91 Tex. 569, 44 S. W. Rep. 1067; Atlanta & West Point R. Co. v. Smith, 94 Ga. 107, 20 S. E. Rep. 763; Western U. Tel. Co. v. Woods, 88 Ill. App. 375.

It is otherwise where a minor is residing with one under no legal or moral obligation to support him. Fort Worth Street R. Co. v. Witten, 74 Tex. 202, 11 S. W. Rep. 1091.

It is held in Kansas that primarily the right to compensation for loss of time and expenses belongs to the child; it is a part of his capital with which to procure his maintenance, support and education. But as the parent, as his guardian or trustee, is responsible for all these, he or she is allowed to recover such compensation. This is a privilege which may be waived, and it is waived where the parent commences the action to recover such compensation in the name of and as the next friend of the child. Abeles v. Bransfield, 18 Kan. 16. In this case the mother was the only surviving parent. The petition claimed compensation for loss of time.

A waiver of the parent's right will not be inferred from the fact that he sues as the next friend of his child,

parent for the diminished ability of a minor son the latter may, after the parent's death, and during his minority, recover therefor for the period after such death.[1] A minor may recover for his loss of time if the parent waives his claim thereto, though the waiver be made after suit begun.[2] Where it is sought to recover for a minor's loss of earning power after he shall attain his majority, the value of the use of the money he may recover should be considered. It is to be presumed, at least in the case of a child, that if he had not been injured his capacity to earn money after his twenty-first year would not exceed that of ordinary men.[3]

A married woman cannot recover for a similar loss, except pursuant to a statute, because her husband is entitled to her services.[4] But if she supports herself under an agreement

unless the pleadings indicate an intention to that effect on his part. Texas & P. R. Co. v. Morin, 66 Tex. 225, 18 S. W. Rep. 503.

[1] Missouri, etc. R. Co. v. Tonahill, 16 Tex. Civ. App. 625, 41 S. W. Rep. 875.

[2] Judd v. Ballard, 66 Vt. 668, 30 Atl. Rep. 96. See next to last preceding note.

[3] St. Louis, etc. R. Co. v. Waren, 65 Ark. 619, 48 S. W. Rep. 222.

[4] Atchison, etc. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. Rep. 453; Filer v. New York Central R. Co., 49 N. Y. 47; Minick v. Troy, 19 Hun, 253; Reynolds v. Robertson, 64 N. Y. 589; Blaechinska v. Howard Mission, etc., 130 N. Y. 497, 29 N. E. Rep. 755, 15 L. R. A. 215; Thomas v. Brooklyn, 58 Iowa, 438, 10 N. W. Rep. 849; Fife v. Oshkosh, 89 Wis. 540, 62 N. W. Rep. 541 (unless she was doing business in her own right, independently of her husband); Becker v. Albany R., 35 App. Div. 46, 54 N. Y. Supp. 395; Hall v. Manson, 90 Iowa, 585, 58 N. W. Rep. 881; Frohs v. Dubuque, 109 Iowa, 219, 80 N. W. Rep. 341; Holton v. Hicks, 9 Kan. App. 179, 186, 58 Pac. Rep. 998; Plummer v. Milan, 70 Mo. App. 598; Wallis v. Westport, 82 id. 522.

Under a statute giving a married woman authority to carry on business as a *feme sole* and to appropriate the proceeds of her labor, a loss of earning capacity incident to a personal injury is a loss for which she may recover. Texas & P. R. Co. v. Humble, 97 Fed. Rep. 837, 38 C. C. A. 502, Sanborn, C. J., dissenting. Such seems to be the rule under similar statutes in Massachusetts, Montana and Missouri. Hamilton v. Great Falls Street R. Co., 17 Mont. 334, 352, 42 Pac. Rep. 860, 43 id. 713; Harmon v. Old Colony R. Co., 165 Mass. 100, 42 N. E. Rep. 505, 30 L. R. A. 658, 52 Am. St. 499; Jordan v. Middlesex R. Co., 138 Mass. 425; Smith v. Chicago & A. R. Co., 119 Mo. 246, 252, 23 S. W. Rep. 784. In his dissenting opinion Judge Sanborn says these authorities seem to rest on a supposed distinction between loss of service and diminution of the capacity to labor, and to hold that the husband may recover for the former and the wife for the latter; but there is and can be no practical distinction between them. The loss of service is the measure of the impairment of the capacity and the proof of it, and to permit the husband to

with her husband that she should have her earnings, she may recover for the loss of her services.[1] A wife may recover for all the injurious effects of the wrong apart from the mere loss of service and society to which the husband is entitled, and, in some jurisdictions, the expense of medical treatment and nursing. Physical disability is a personal loss apart from its effect upon earning power.[2] In Georgia a physical injury which impairs the capacity of a married woman to labor is classified with pain and suffering. The compensation to be awarded is not to be measured by her pecuniary earnings, for such earnings as a general rule belong to the husband, and the right of action for their loss is in him; "but the wife herself has such an interest in her working capacity as that she can recover something, in a proper case, for its impairment or destruction, and what she is to be allowed ought to be more or less according to the nature of the injury and the length of time during which the pain and deprivation is going to continue," which amount is left to the discretion of the jury.[3] In the nature of the case the sum which will compensate for such damage is not ascertainable by mathematical computation; it must be fixed by the jury with respect to the evidence and

recover for the loss of service and the wife for impairment of capacity to render it is to allow two recoveries for the same damages. See Blaechinska v. Howard Mission, etc., 130 N. Y. 497, 29 N. E. Rep. 755, 15 L. R. A. 215.

Under the Missouri statute empowering a married woman to do business on her own account, if her labor is intended to aid the husband in the support of the family, the loss of it must be recovered for by him. Plummer v. Milan, 70 Mo. App. 598.

In Illinois loss of time by a married woman is an element of damages in an action by her. West Chicago Street R. Co. v. Carr, 170 Ill. 478, 48 N. E. Rep. 992.

If for any reason the husband is not entitled to his wife's services the complaint by her must allege the fact. Uransky v. Dry Dock Co., 118 N. Y. 304, 23 N. E. Rep. 451, 16 Am. St. 759.

[1] Boyle v. Saginaw, 124 Mich. 348, 82 N. W. Rep. 1057, and local cases cited. See as to the rule in Iowa, Bailey v. Centerville, 108 Iowa, 20, 26, 78 N. W. Rep. 831.

[2] Cullar v. Missouri, etc. R. Co., 84 Mo. App. 340.

[3] Metropolitan Street R. Co. v. Johnson, 90 Ga. 500. 16 S. E. Rep. 49; Atlanta Street R. Co. v. Jacobs, 88 Ga. 647, 15 S. E. Rep. 825.

In Kentucky a married woman may earn wages, and the fact that she performed household duties for her family is not to be considered in determining what she could probably have earned. The same criterion of recovery exists as to her as to a man or a single woman. South Covington & C. Street R. Co. v. Bolt, 22 Ky. L. Rep. 906, 59 S. W. Rep. 26.

the probabilities, and should be sufficient to compensate the plaintiff.[1]

If he was engaged at wages at the time of the injury and his employer continued to pay them during the period of disability, there can be no recovery for loss of wages.[2] The gross sum which might have been earned is not the measure of recovery, but the present value of the sum that might have been earned during the plaintiff's expectancy of life.[3] The loss of earning capacity may be arrived at by estimating as near as may be the plaintiff's probable yearly earnings during his life and giving him such sum as would purchase a life annuity equal to the difference between the amount which he would have earned each year if he had not been injured and that which he could earn each year in his injured condition.[4] A member of a firm is entitled to recover the value of his time without regard to the extent of his interest as a partner.[5] It is immaterial to the right to recover that the plaintiff contemplated leaving the employment he was engaged in when injured. The jury are not bound to award damages with respect to the incapacity to pursue a particular line of work, but may award it with reference to incapacity to earn money in any avocation the injured party might pursue in the future.[6] The expense of keeping a servant to do what the plaintiff would have done but for the injury may be recovered.[7]

[1] Filer v. New York Central R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Minick v. Troy, 19 Hun, 253; Denver v. Sherret, 88 Fed. Rep. 226, 31 C. C. A. 499, 509; Rogan v. Montana Central R. Co., 20 Mont. 503, 52 Pac. Rep. 206, citing the text as it was in the second edition.

[2] Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 So. Rep. 363; De La Vergne Refrigerating Machine Co. v. Stahl, 24 Tex. Civ. App. 471, 60 S. W. Rep. 319; Drinkwater v. Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624; Ephland v. Missouri Pacific R. Co., 57 Mo. App. 147; Lee v. Western U. Tel. Co., 51 id. 375. Compare Elmer v. Fessenden, 154 Mass. 427, 28 N. E. Rep. 299.

[3] Alabama G. S. R. Co. v. Carroll, 84 Fed. Rep. 772, 28 C. C. A. 207; Coley v. North Carolina R. Co., 128 N. C. 534, 542, 39 S. E. Rep. 43; Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 17, 35 Atl. Rep. 191, 55 Am. St. 705; St. Louis, etc. R. Co. v. Farr, 56 Fed. Rep. 994, 6 C. C. A. 211.

[4] Baltimore & O. R. Co. v. Henthorne, 73 Fed. Rep. 634, 19 C. C. A. 623.

[5] Kendall v. Albia, 73 Iowa, 241, 34 N. W. Rep. 833.

[6] Houston & T. Central R. Co. v. McCullough, 22 Tex. Civ. App. 208, 55 S. W. Rep. 392.

[7] Willis v. Second Avenue Traction Co., 189 Pa. 430, 43 Atl. Rep. 1.

§ 1250. Expenses for surgical and medical aid, etc. Such expenses and also the cost of nursing, when necessary and reasonably incurred, are part of the injury and may be recovered under proper pleadings.[1] The rule which makes such expenditures an element of the damages is based upon the doctrine of avoidable consequences. It is the duty of the person injured to exercise reasonable precautions in order to render the injury as light as possible. Failing to perform that duty,

[1] Mirrielees v. Wabash R. Co., 163 Mo. 470, 63 S. W. Rep. 718; Sheehan v. Edgar, 58 N. Y. 631; Beardsley v. Swann, 4 McLean, 333; Missouri, etc. R. Co. v. Weaver, 16 Kan. 456; Forbes v. Loftin, 50 Ala. 396; Klein v. Thompson, 19 Ohio St. 569; Chicago v. Jones, 66 Ill. 349; Chicago v. Langlass, id. 361; Chicago v. O'Brennan, 65 id. 160; Peoria Bridge Ass'n v. Loomis, 20 id. 235, 71 Am. Dec. 263; The Canadian, 1 Brown, Adm. 11; Indianapolis, etc. R. Co. v. Birney, 71 Ill. 391; St. Louis, etc. R. Co. v. Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Chicago & E. R. Co. v. Holland, 122 Ill. 461. 13 N. E. Rep. 145; Wall v. Livezay, 6 Colo. 465; Indiana Car Co. v. Parker, 100 Ind. 182; Central Passenger R. Co. v. Kuhn, 86 Ky. 578, 6 S. W. Rep. 441, 9 Am. St. 309; Phillips v. London, etc. R. Co., 42 L. T. Rep. 6; Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589, 24 N. W. Rep. 675; Scott v. Montgomery, 95 Pa. 444; Hulehan v. Green Bay, etc. R. Co., 68 Wis. 520, 32 N. W. Rep. 529; Hart v. Railroad Co., 33 S. C. 427, 12 S. E. Rep. 9, 10 L. R. A. 794; Alabama G. S. R. Co. v. Siniard, 123 Ala. 557, 26 So. Rep. 689; Stewart v. Philadelphia, W. & B. R. Co., 8 Houst. 450, 17 Atl. Rep. 639; Jones v. Belt, 8 Houst. 562, 32 Atl. Rep. 723; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 628, 35 N. E. Rep. 162; Golder v. Lund, 50 Neb. 867, 70 N. W. Rep. 379; Farley v. Charleston Basket & Veneer Co., 52 S. C. 222, 28 S. E. Rep. 193; Washington & G. R. Co. v. Patterson, 9 D. C. App. Cas. 423; Cousins v. Lake Shore & M. S. R. Co., 96 Mich. 386, 56 N. W. Rep. 14; Smith v. Chicago & A. R. Co., 108 Mo. 243, 18 S. W. Rep. 971; Robertson v. Wabash R. Co., 152 Mo. 382, 53 S. W. Rep. 1082; Friend v. Ingersoll, 39 Neb. 717, 727, 58 N. W. Rep. 281; Page v. Delaware & H. Canal Co., 34 App. Div. 618, 54 N. Y. Supp. 442; Andrews v. Toledo, etc. R. Co., 19 Ohio Ct. Ct. 699; Houston, etc. R. Co. v. Rowell, 92 Tex. 147, 46 S. W. Rep. 630; Missouri, etc. R. Co. v. Belew, 22 Tex. Civ. App. 264, 54 S. W. Rep. 1079; Alabama, etc. R. Co. v. Davis, 119 Ala. 572, 24 So. Rep. 862; Rhyner v. Menasha, 107 Wis. 201, 83 N. W. Rep. 303. See Western Gas Const. Co. v. Danner, 97 Fed. Rep. 882, 38 C. C. A. 528.

A claim for money expended for "nursing and medical attendance" covers expenditures for medicines used by physicians in giving such attendance. Knapp v. Sioux City & P. R. Co., 71 Iowa, 41, 32 N. W. Rep. 18.

Under an allegation that plaintiff has suffered great expense, injury to bedding by the application of medicine to the wounded part may be proved. Fox v. Chicago, etc. R. Co., 86 Iowa, 368, 17 L. R. A. 289, 53 N. W. Rep. 259.

There cannot be a recovery of the cost of an artificial limb purchased in consequence of the defendant's wrongful act unless such cost is specially pleaded. Southern Pacific Co. v. Hall, 100 Fed. Rep. 760, 41 C. C. A. 50.

he cannot recover for consequences which might by its performance have been avoided. There is another equally good reason for the existence of the rule — such expenses are the natural and proximate consequence of a serious physical injury. Such damages are generally treated as special, because they do not necessarily result from all personal injuries,[1] [721] but in case of severe bodily injury the assistance of physicians is so obviously necessary as to be provable under a general allegation of damages.[2] Where the damages are considered to be special the amount incurred or paid for such services need not be alleged.[3] Where such expenses have been incurred by the injured party, so that he is liable therefor, he is entitled to recover for them though they have not been paid,[4] or

[1] South Covington & C. Street R. Co. v. Ware, 84 Ky. 267, 1 S. W. Rep. 493; O'Leary v. Rowan, 31 Mo. 117; Jesse v. Shuck, 11 Ky. L. Rep. 463, 12 S. W. Rep. 304; Macon v. Paducah Street R. Co., 23 Ky. L. Rep. 46, 62 S. W. Rep. 496; Illinois Central R. Co. v. Hanberry, 23 Ky. L. Rep. 1867, 66 S. W. Rep. 417.

[2] Folsom v. Underhill, 36 Vt. 581; Evansville & T. H. R. Co. v. Holcomb, 9 Ind. App. 198, 36 N. E. Rep. 39; Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9, 72 Am. Dec. 287; Laing v. Calder, 8 Pa. 479, 49 Am. Dec. 533; Pennsylvania, etc. Canal Co. v. Graham, 63 Pa. 290, 3 Am. Rep. 549. But see Illinois Central R. Co. v. Hanberry, *supra*.

[3] Kupferschmid v. Southern Electric R. Co., 70 Mo. App. 438. Compare Toledo Electric Street R. Co. v. Tucker, 13 Ohio Ct. Ct. 411.

[4] Gries v. Zeck, 24 Ohio St. 329; Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. Rep. 546; Styles v. Decatur, — Mich. —, 91 N. W. Rep. 622; McLaughlin v. San Francisco, etc. R. Co., 113 Cal. 590, 45 Pac. Rep. 839 (but there cannot be a recovery of the sum for which liability has been incurred under an allegation that it had been paid); Ward v. Haws, 5 Minn. 440; Chicago & E. R. Co. v. Cleminger, 178 Ill. 536, 53 N. E. Rep. 320; Mueller v. Kuhn, 59 Ill. App. 353; Richardson v. Chasen, 10 Q. B. 756; Consolidated Coal Co. v. Scheiber, 65 Ill. App. 304; Chicago & A. R. Co. v. Harrington, 77 Ill. App. 499, 503, quoting the text; Flanagan v. Baltimore & O. R. Co., 83 Iowa, 639, 50 N. W. Rep. 60 (but see Bowsher v. Chicago, etc. R. Co., 113 Iowa, 16, 21, 84 N. W. Rep. 858); San Antonio & A. P. R. Co. v. Moore, 72 S. W. Rep. 226 (Tex. Ct. of Civ. App.); Abilene v. Wright, 4 Kan. App. 708, 46 Pac. Rep. 715; Lammiman v. Detroit Citizens' Street R. Co., 112 Mich. 602, 71 N. W. Rep. 153; Gorham v. Kansas City & S. R. Co., 113 Mo. 408, 421, 20 S. W. Rep. 1060; Friend v. Ingersoll, 39 Neb. 717, 727, 58 N. W. Rep. 281, citing the text; Omaha Street R. Co. v. Emminger, 57 Neb. 240, 77 N. W. Rep. 675; Clarke v. Westcott, 2 App. Div. 503, 37 N. Y. Supp. 1111; Chacey v. Fargo, 5 N. D. 173, 64 N. W. Rep. 932; Parker v. South Carolina & G. R. R., 48 S. C. 364, 382, 26 S. E. Rep. 669; Wilson v. Southern Pacific Co., 13 Utah, 352, 360, 44 Pac. Rep. 1040, 57 Am. St. 766; Denver, etc. R. Co. v. Lorentzen, 79 Fed. Rep. 291, 24 C. C. A. 592.

though they have been voluntarily paid by another,[1] or the services were rendered gratuitously.[2] This ruling has been and is questioned for carrying the allowance for compensation beyond the actual injury.[3] There cannot be a recovery

[1] Klein v. Thompson, 19 Ohio St. 569.

[2] Indianapolis v. Gaston, 58 Ind. 227; Brosnan v. Sweetser, 127 id. 1, 26 N. E. Rep. 555; Ohliger v. Toledo, 20 Ohio Ct. Ct. 142; In re D. S. Gregory & The George Washington, 2 Bene. 226; Berringer v. Dubuque Street R. Co., — Iowa, —, 91 N. W. Rep. 931; Yeager v. Spirit Lake, 115 Iowa, 593, 88 N. W. Rep. 1095.

[3] Duke v. Missouri Pacific R. Co., 99 Mo. 347, 12 S. W. Rep. 636; Morris v. Grand Avenue R. Co., 144 Mo. 500, 46 S. W. Rep. 170; Alabama, etc. R. Co. v. Davis, 119 Ala. 572, 586, 24 So. Rep. 862.

In Drinkwater v. Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624, Earl, J., delivering the opinion of the court on the point that the injured party was entitled to nothing for loss of wages where they were paid to him during his disability, referred to the exclusion of evidence offered for the purpose of mitigation where money had been received on an accident insurance by reason of the injury in question, and of the receipt of money on other insurance in cases of suit for wrongful destruction or conversion of property. He said: "In such cases proof of the insurance actually paid would not tend to show that the damage claimed was not actually occasioned by the wrong-doer; but it would simply show that compensation had been received by the injured party, in whole or in part, from some other party,—not that the wrong-doer had made satisfaction which alone could give him a defense. Here the proof was offered, not in mitigation or satisfaction of any damage actually done the plaintiff, but to show that he did not suffer the damage claimed, to wit, the loss of wages. Before the plaintiff could recover for the loss of wages, he was bound to show that he lost the wages in consequence of the injuries, and how much they were. The defendant had the right to show that he lost no wages, or that they were not as much as he claimed. He had the right to show, if he could, that for some particular reason the plaintiff would not have earned any wages if he had not been injured, or that he was under such a contract with his employer that his wages went on without service, or that his employer paid his wages from mere benevolence. In either case, upon such showing, the plaintiff could not claim that the defendant's wrong caused him to lose his wages, and the loss of wages could form no part of his damage. So the expense of nursing may be recovered as an item of damage, if properly incurred. But the defendant may show that no such expense was incurred, as that the plaintiff was nursed by a sister of charity. So the doctor's bill may in such a case be recovered. But plaintiff must show what he paid the doctor, or was bound to pay. The defendant may show that the plaintiff was doctored at a charity hospital, or at the expense of the town or county, or gratuitously. In such case the doctor's bill could not be an element of his damage."

In Peppercorn v. Black River Falls, 89 Wis. 38, 61 N. W. Rep. 79, 46 Am. St. 818, the plaintiff was a minor. It was held that there was no error in refusing to allow her to recover for moneys paid out or incurred by her brother in her behalf for medical

on account of expenses incurred if the petition only claims reimbursement for moneys expended.[1] If payment has not been made and cannot be compelled because of the incapacity of the person who has rendered medical services to sue therefor, the amount of his charge cannot be recovered.[2] The measure of recovery for medical attention is not the usual charge of the particular physician who is on the witness stand, but the usual and reasonable charge of the profession generally.[3] If the evidence shows the number of the physician's visits to the plaintiff and the number of treatments given him elsewhere there is a basis for awarding compensation therefor.[4] But in Pennsylvania testimony as to the value of medical services is not dispensed with though they be described by the physician.[5]

The value of services rendered by women in the house where the plaintiff was may be fixed by the jurors, without detailed proof, on their own knowledge and experience, the length of time they were rendered being shown.[6] It is not a valid reason for not allowing the recovery of the amount paid for the services of a trained nurse that there were persons in the plaintiff's family who could have given him the care and attention needed without expense, unless it is proven that they were competent to do so.[7] Proof of the sum paid is some evidence of the value of the services rendered, and authorizes the

attendance and medicines. It may be that the physician so in attendance and the person so furnishing the medicines, respectively, might have recovered therefor as for necessaries, but those things gave her no right of action for moneys voluntarily paid and voluntarily incurred by her brother or her father.

[1] Missouri, etc. R. Co. v. Reasor, 68 S. W. Rep. 332 (Tex. Ct. of Civ. App.; writ of error denied by Sup. Ct.).

[2] Chicago v. Honey, 10 Ill. App. 535; Dixon v. Bell, 1 Stark. 287; San Antonio Street R. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. Rep. 752.

Notwithstanding a statute prohibits a recovery for medical services rendered by one not licensed to practice under it, in an action to which the person who has practiced as a physician is not a party the presumption is that he was qualified to practice. Golder v. Lund, 50 Neb. 867, 871, 70 N. W. Rep. 379; Chicago v. Wood, 24 Ill. App. 40.

[3] Chicago City R. Co. v. Wall, 93 Ill. App. 411, 416; Bowsher v. Chicago, etc. R. Co., 113 Iowa, 16, 84 N. W. Rep. 958.

[4] Scullane v. Kellogg, 169 Mass. 544, 48 N. E. Rep. 622.

[5] Brown v. White, 202 Pa. 297, 51 Atl. Rep. 962.

[6] Murray v. Missouri Pacific R. Co., 101 Mo. 236, 13 S. W. Rep. 817, 20 Am. St. 601.

[7] Kendall v. Albia, 73 Iowa, 241, 34 N. W. Rep. 833.

[722] consideration of the item in assessing damages.[1] A married woman cannot recover in an action for personal injury the physician's and nurse's bills as items of damage because she is not liable for them.[2] The same rule applies to a minor living with his parents, unless he has paid the bill,[3] or is legally bound to pay it.[4] But the presumption that the husband is liable for medical services rendered his wife is overcome by proof that she has expended money or incurred liability therefor on her own account, in which case she may recover therefor.[5] In some states married women, by virtue of statutes, may recover the sum reasonably paid for medical services,[6] or such sum incurred.[7] A wife has recovered where her husband was not a resident of the state and they had not lived together for six years, she having supported herself during that time,[8] and where the services were rendered solely on her credit.[9] Under a statute providing that neither husband nor wife shall be entitled to compensation for labor or services rendered for the other, a husband cannot recover for the services of his wife in nursing him.[10] In the absence of a statute a mother has recovered for the value of her time given to an injured child,[11] as has a father for nursing done his infant by his wife and daughter.[12] In Pennsylvania a husband cannot recover for the nursing and attendance furnished by members of his own household, unless

[1] Colwell v. Manhattan R. Co., 57 Hun, 452, 10 N. Y. Supp. 636.

[2] Tompkins v. West, 56 Conn. 478, 16 Atl. Rep. 237; Lewis v. Atlanta, 77 Ga. 756, 4 Am. St. 108; Moody v. Osgood, 50 Barb. 628; State v. Detroit, 113 Mich. 643, 72 N. W. Rep. 8; Rogers v. Orion, 116 Mich. 324, 74 N. W. Rep. 463; Belyea v. Minneapolis, etc. R. Co., 61 Minn. 224, 63 N. W. Rep. 627; Becker v. Albany R., 35 App. Div. 46, 54 N. Y. Supp. 395; Mount Adams & E. P. R. Co. v. Wysong, 2 Ohio Dec. 65.

[3] Newbury v. Getchel & Martin Lumber & Manuf. Co., 100 Iowa, 441, 457, 69 N. W. Rep. 743, 62 Am. St. 582; Burke v. Ellis, 105 Tenn. 702, 58 S. W. Rep. 855; Peppercorn v. Black River Falls, 89 Wis. 38, 61 N. W. Rep. 79, 46 Am. St. 818.

[4] Judd v. Ballard, 66 Vt. 668, 30 Atl. Rep. 96.

[5] Board of Commissioners v. Castetter, 7 Ind. App. 309, 321, 33 N. E. Rep. 986, 34 id. 687.

[6] Hill v. Sedalia, 64 Mo. App. 494.

[7] Chacey v. Fargo, 5 N. D. 173, 179, 64 N. W. Rep. 932; West Chicago Street R. Co. v. Carr, 170 Ill. 478, 48 N. E. Rep. 992; Hickey v. Welch, 91 Mo. App. 4.

[8] Lammiman v. Detroit Citizens' Street R. Co., 112 Mich. 602, 71 N. W. Rep. 153; Boyle v. Saginaw, 124 Mich. 348, 82 N. W. Rep. 1057.

[9] Lacas v. Detroit City R. Co., 92 Mich. 412, 52 N. W. Rep. 745.

[10] Peoria, etc. R. Co. v. Johns, 43 Ill. App. 83.

[11] Morgan v. Dallas County, 103 Iowa, 57, 72 N. W. Rep. 304.

[12] Blackwell v. Hill, 76 Mo. App. 46.

they are hired servants.[1] But the weight of authority is in favor of the opposing view.[2] This doctrine is rested on the theory that the wrong-doer has no right to the services of the members of the plaintiff's family. The ordinary wages paid for care and attendance measures the recovery,[3] not the sum which the person employed could have earned at other work, though that was given up for the purpose of enabling him to nurse the injured.[4] It is said in a late case that a husband could testify to the facts relating to his services in attending his wife, and their value or the time lost, but not as to the general trouble he was put to on account of her injuries.[5] But this is clearly contrary to the weight of authority, though the justice of such a rule could not be seriously questioned if it were shown that no person could be employed for the purpose of caring for the injured one. In an action for a personal injury by a minor who has no father or guardian, he may recover as part of his damages bills for medical attendance during any illness resulting from such injury.[6] If the injured person dies the medical expenses incurred by him cannot be recovered by his personal representative.[7] Under a statute authorizing a recovery for personal injury or damage to property caused by a defective highway, there cannot be a recovery for the expense of medical attendance.[8]

§ 1251. But one action maintainable; prospective damages. A personal injury from a single wrongful act or negligence is an entirety and affords ground for only one action.

[1] Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 14, 35 Atl. Rep. 191, 55 Am. St. 705.

[2] Crouse v. Chicago & N. R. Co., 102 Wis. 196, 78 N. W. Rep. 446; Missouri, etc. R. Co. v. Holman, 15 Tex. Civ. App. 16, 39 S. W. Rep. 130; Varnham v. Council Bluffs, 52 Iowa, 698, 3 N. W. Rep. 792; Brosnan v. Sweetser, 127 Ind. 1, 26 N. E. Rep. 555. See § 1252.

[3] Brosnan v. Sweetser, *supra.*

[4] Western U. Tel. Co. v. Morris, 10 Kan. App. 61, 61 Pac. Rep. 972; Southern R. Co. v. Crowder, 135 Ala. 417, 428, 33 So. Rep. 335; Walker v. Philadelphia, 195 Pa. 168, 45 Atl. Rep. 657, 78 Am. St. 801; Hazard Powder Co. v. Volger, 58 Fed. Rep. 152, 7 C. C. A. 130; Salida v. McKinna, 16 Colo. 523, 27 Pac. Rep. 810; Selleck v. Janesville, 104 Wis. 570, 579, 80 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 691. *Contra*, Fort Worth, etc. R. Co. v. Kennedy, 12 Tex. Civ. App. 654, 35 S. W. Rep. 335.

[5] Dallas v. Moore, 74 S. W. Rep. 95 (Tex. Ct. of Civ. App.).

[6] Forbes v. Loftin, 50 Ala. 396; Ellyson v. International, etc. R. Co., 75 S. W. Rep. 868 (Tex. Ct. of Civ. App.).

[7] Pulling v. Great Eastern R. Co., 9 Q. B. Div. 110.

[8] Nestor v. Fall River, — Mass. —, 67 N. E. Rep. 248.

In that action recovery may be had for all damages suffered up to the time of the trial, and for all which are shown to be reasonably certain or probable to be suffered in the future,[1] or

[1] It is competent to prove by medical experts the probability that the injury will permanently impair the health and physical or mental ability of the plaintiff. Louisville, etc. R. Co. v. Falvey, 104 Ind. 409, 422, 3 N. E. Rep. 385, 4 id. 908, citing Tinney v. New Jersey Steamboat Co., 12 Abb. Pr. (N. S.) 1; Filer v. New York Central R. Co., 49 N. Y. 42; Wilt v. Vickers, 8 Watts, 227; Kent v. Lincoln, 32 Vt. 591; Montgomery v. Scott, 34 Wis. 338; Toledo, etc. R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Townsend v. Paoli, 41 Kan. 591, 21 Pac. Rep. 596; Sloan v. Edwards, 61 Md. 89; Lemoine v. Cook, 36 Mo. App. 193; Ganard v. Rochester, etc. R. Co., 50 Hun, 22, 2 N. Y. Supp. 470; White v. Milwaukee City R. Co., 61 Wis. 536, 21 N. W. Rep. 524; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. Rep. 1. Barr v. City of Kansas, 121 Mo. 22, 25 S. W. Rep. 562; Ayres v. Delaware, etc. R. Co., 158 N. Y. 254, 53 N. E. Rep. 22; Nichols v. Brabazon, 94 Wis. 549, 69 N. W. Rep. 342; Denver, etc. R. Co. v. Roller, 100 Fed. Rep. 738, 41 C. C. A. 22, 49 L. R. A. 77, are to the same effect. But direct expert evidence is not essential. Missouri, etc. R. Co. v. Fowler, 61 Kan. 320, 59 Pac. Rep. 648; Ayres v. Delaware, etc. R. Co., 158 N. Y. 254, 53 N. E. Rep. 22 Nor any expert evidence. Horowitz v. Hamburg-American Packet Co., 18 N. Y. Misc. 24, 41 N. Y. Supp. 54; Shaier v. Broadway Imp. Co., 22 App. Div. 102, 47 N. Y. Supp. 815.

In Wisconsin it is error to receive the evidence of a physician as to the necessity of medical attendance and the services of nurses for the plaintiff in the future, and as to the extent to which such attendance would be required. Crouse v. Chicago & N. R. Co., 104 Wis. 473, 80 N. W. Rep. 752, two judges dissenting; Selleck v. Janesville, 104 Wis. 570, 80 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 691. *Contra*, Martin v. Southern Pacific Co., 130 Cal. 285, 62 Pac. Rep. 515. The California rule is to be preferred.

It is error to use the word "may" in connection with future pain, etc. Ford v. Des Moines, 106 Iowa, 94, 79 N. W. Rep. 630; Pennsylvania Co. v. Files, 65 Ohio St. 403, 62 N. E. Rep. 1047. The use of the word "probably" in that connection was approved. The court said in the Ford case: While one court has disapproved of the use of the term "reasonable probability" in an instruction relating to future pain and suffering (Block v. Milwaukee Street R. Co., 89 Wis. 371, 61 N. W. Rep. 1101, 46 Am. St. 849, 27 L. R. A. 365, and Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360, 64 N. W. Rep. 1041, 51 Am. St. 912, 30 L. R. A. 504), yet this same court has also held that an instruction to the effect that plaintiff might recover for pain which she may have to endure in the future, but that, in order to assess damages for the future, the jury must be satisfied to a reasonable extent, from the evidence, that she will continue to suffer, was good. Kliegel v. Aitken, 94 Wis. 432, 69 N. W. Rep. 67, 59 Am. St. 900, 35 L. R. A. 249. Other courts have approved of the use of the word "likely" (Illinois Central R. Co. v. Davidson, 76 Fed. Rep. 517, 22 C. C. A. 306; Scott v. Montgomery, 95 Pa. 444); and others, the words "reasonably certain" (Stafford v. Oskaloosa, 64 Iowa, 251, 20 N. W. Rep. 174; Ross v. Kansas City, 48 Mo. App. 440; Sher-

such as it is fair to believe will be so suffered.[1] Such prospective damages may include compensation for pain, disability and expenses.[2] For this reason it is important in cases of serious injury to determine the permanence of any disability

wood v. Chicago & N. W. R. Co., 82 Mich. 374, 46 N. W. Rep. 773); and still others, "reasonably result" (Chilton v. St. Joseph, 143 Mo. 192, 44 S. W. Rep. 766). Reasonable certainty that future pain and suffering or loss of capacity will follow is all that is required. When we say that it is "likely" or "probable" that such results will follow, we mean the evidence preponderates that way, and there is that reasonable certainty which the law requires. In accord as to the use of "may," Chicago Great Western R. Co. v. Bailey, 9 Kan. App. 207, 59 Pac. Rep. 659; Hardy v. Milwaukee Street R. Co., 89 Wis. 183, 61 N. W. Rep. 771; Raymond v. Keseberg, 91 Wis. 191, 64 N. W. Rep. 861; Sanders v. O'Callaghan, 111 Iowa, 574, 581, 82 N. W. Rep. 969; Omaha, etc. R. Co. v. Brady, 39 Neb. 27, 56, 57 N. W. Rep. 767; Hall v. Cedar Rapids, etc. R. Co., 115 Iowa, 18, 88 N. W. Rep. 448.

It is error to submit the question of permanent damages on "the probability or improbability" of their being sustained. McBride v. St. Paul City R. Co., 72 Minn. 291, 75 N. W. Rep. 231. And to use the words "likely to endure." Kucera v. Merrill Lumber Co., 91 Wis. 637, 65 N. W. Rep. 374; Collins v. Janesville, 99 Wis. 464, 75 N. W. Rep. 88.

[1] Swensen v. Bender, 114 Fed. Rep. 1, 51 C. C. A. 627; Denver, etc. R. Co. v. Roller, 100 Fed. Rep. 738, 41 C. C. A. 22, 49 L. R. A. 77.

[2] Elkhart v. Ritter, 66 Ind. 136; Indianapolis v. Gaston, 58 id. 224; Drinkwater v. Dinsmore, 10 Hun, 250; Tefft v. Wilcox, 6 Kan. 46; Howell v. Goodrich, 69 Ill. 556; Stewart v. Ripon, 38 Wis. 584; McLaughlin v. Corry, 77 Pa. 109, 18 Am. Rep. 432; Barbour County v. Horn, 48 Ala. 566; Goodno v. Oshkosh, 28 Wis. 309; Curtis v. Rochester, etc. R. Co., 18 N. Y. 542; Ransom v. New York, etc. R. Co., 15 id. 415; Wiesenberg v. Appleton, 26 Wis. 56; § 120; Barlow v. Lowder, 35 Ark. 492; Atlanta, etc. R. v. Johnson, 66 Ga. 259; Chicago & E. R. Co. v. Holland, 122 Ill. 461, 13 N. E. Rep. 145; Macer v. Third Avenue R. Co., 47 N. Y. Super. Ct. 461; Cleveland, etc. R. Co. v. Newell, 104 Ind. 264, 3 N. E. Rep. 836, 54 Am. Rep. 312; Morgan v. Kendall, 124 Ind. 454, 24 N. E. Rep. 143, 9 L. R. A. 445; Kendall v. Albia, 73 Iowa, 241, 34 N. W. Rep. 833; Wardle v. New Orleans, etc. R. Co., 35 La. Ann. 202; Feeney v. Long Island R. Co., 116 N. Y. 375, 22 N. E. Rep. 402, 5 L. R. A. 544; Staat v. Grand Street & N. R. Co., 36 Hun, 208; Wallace v. Western North Carolina R. Co., 104 N. C. 442, 10 S. E. Rep. 552; Scott v. Montgomery, 95 Pa. 444; Walker v. Erie R. Co., 63 Barb. 260; Indianapolis Street R. Co. v. Robinson, 157 Ind. 414, 61 N. E. Rep. 936; Hickey v. Welch, 91 Mo. App. 4; Westercamp v. Brooks, 115 Iowa, 159, 88 N. W. Rep. 372; Snook v. Anaconda, 26 Mont. 128, 66 Pac. Rep. 756; Yerkes v. Northern Pacific R. Co., 112 Wis. 184, 88 N. W. Rep. 33; Wallace v. Wilmington & N. R. Co., 8 Houst. 529, 18 Atl. Rep. 818; Ford v. Warner Co., 1 Marvel, 88, 37 Atl. Rep. 39; Murphy v. Hughes, 1 Pennewill, 250, 50 Atl. Rep. 187; Sandwich v. Dolan, 141 Ill. 430, 31 N. E. Rep. 416; Bailey v. Centerville, 108 Iowa, 20, 78 N. W. Rep. 831; Edgerton v. O'Neil, 4 Kan. App. 73, 46 Pac. Rep. 206; Rosenkranz v. Lindell R. Co.,

or reduction of working capacity, or impairing effect upon health resulting therefrom. Besides giving compensation for future pain and the anticipated expense of treatment and nursing, it appearing that they are reasonably certain to oc-

108 Mo. 9, 18 S. W. Rep. 890, 32 Am. St. 588; Gorham v. Kansas City & S. R. Co., 113 Mo. 408, 20 S. W. Rep. 1060; Bigelow v. Metropolitan Street R. Co., 48 Mo. App. 367; Stuppy v. Hof, 82 id. 272; Hamilton v. Great Falls Street R. Co., 17 Mont. 334, 352, 42 Pac. Rep. 860, 43 id. 713; Omaha Street R. Co. v. Emminger, 57 Neb. 240, 77 N. W. Rep. 675; Ayres v. Delaware, etc. R. Co., 158 N. Y. 254, 53 N. E. Rep. 22; Kane v. New York, etc. R. Co., 132 N. Y. 160, 30 N. E. Rep. 256; Cicero & P. Street R. Co., v. Brown, 89 Ill. App. 218, 193 Ill. 274, 61 N. E. Rep. 1093; McCracken v. Smathers, 122 N. C. 799, 29 S. E. Rep. 354; Smitson v. Southern Pacific Co., 37 Ore. 74, 60 Pac. Rep. 907; Baker v. Hagey, 177 Pa. 128, 35 Atl. Rep. 705, 55 Am. St. 712; Schenkel v. Pittsburg & B. Traction Co., 194 Pa. 182, 44 Atl. Rep. 1072; San Antonio, etc. R. Co. v. Weigers. 23 Tex. Civ. App. 344, 54 S. W. Rep. 910; Cameron v. Union Trunk Line, 10 Wash. 507, 39 Pac. Rep. 128; Nichols v. Brabazon, 94 Wis. 549, 69 N. W. Rep. 342; Kenyon v. Mondovi, 98 Wis. 50, 73 N. W. Rep. 314; Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 584, 13 Sup. Ct. Rep. 557; Eddy v. Wallace, 49 Fed. Rep. 801, 1 C. C. A. 435; Kansas City, etc. R. Co. v. Stoner, 49 Fed. Rep. 209, 1 C. C. A. 231; Denver v. Sherret, 88 Fed. Rep. 226, 31 C. C. A. 499; Denver, etc. R. Co. v. Roller, 100 Fed. Rep. 738, 41 C. C. A. 22, 49 L. R. A. 77; Washington & G. R. Co. v. Patterson, 9 D. C. App. Cas. 423; Fair v. London & N. W. R. Co., 21 L. T. (N. S.) 326; Chamier v. Hill, 15 S. A. L. R. 84.

The same principle has been applied to actions under the civil damage statute of Michigan. Lucker v. Liske, 111 Mich. 683, 70 N. W. Rep. 421.

In considering the permanency of an injury the jury may take into account the plaintiff's liability to suffer more than he otherwise would from such ailments as ordinarily afflict mankind. Crank v. Forty-second Street, etc. R. Co., 53 Hun, 425, 6 N. Y. Supp. 229.

In Union Pacific R. Co. v. Jones, 49 Fed. Rep. 343, 1 C. C. A. 282, it was held that where the injuries complained of were sustained six months previous to the trial and the plaintiff was then suffering from them, though the proof was that he would probably recover, compensation might be awarded for future suffering and disability which was reasonably certain to result, notwithstanding there was no evidence as to the length of time it would probably continue. The nature of the injury, its effect upon the plaintiff, and its continuance were proven and afforded the jury the basis upon which its conclusion should rest.

To entitle apprehended future consequences to be considered they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible are not to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely so to develop. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a

cur, the pecuniary loss in respect of the diminution of [723] ability to earn money is to be considered by the jury. The material inquiries on this subject will be, what is a pecuniary equivalent for this loss per year, and how long will it continue? The answer to them must be chiefly found in the nature of the injury, the age and general health of the injured party, and his antecedent earning capacity as indicated by his qualifications and the character of his business or calling. In respect to years to come the recovery will be like payment in advance, and the amount should be reduced to its present worth.[1] In a Texas case the trial court instructed the jury on the estimate of damages for the difference between the ability of the party injured before the injury and his ability afterwards to earn wages to find no greater sum than, put at interest, would produce annually a sum equal to the difference between what the plaintiff could earn before and what he can now earn in consequence of the injury. On appeal this instruction was deemed objectionable. Bonner, J., said: "If compensation for lessened ability to labor be assumed as the true measure of damages, then it would seem that it should not be such sum as would bring an annual interest corresponding with the annual value of this lessened ability, leaving the principal sum still belonging to the estate of plaintiff after his death, although he had then become wholly incapacitated for labor; but would be an amount which would purchase an annuity equal to this interest during the probable life of the plaintiff, calculated upon a reliable basis of the average duration of human life."[2]

degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. Per Rapallo, J., in Strohm v. New York, etc. R. Co., 96 N. Y. 305, citing Curtis v. Rochester & S. R. Co., 18 id. 541; Filer v. New York Central R. Co., 49 id. 45; Clark v. Brown, 18 Wend. 229; Lincoln v. Saratoga & S. R. Co., 23 id. 425, 435. See Mosher v. Russell, 44 Hun, 12; Johnson v. Manhattan R. Co., 52 id. 111, 4 N. Y. Supp. 848; Gregory v. New York, etc. R. Co., 55 Hun, 303, 8 N. Y. Supp. 525; Elsas v. Second Avenue R. Co., 56 Hun, 161, 9 N. Y. Supp. 210; Crawford v. Delaware, etc. R. Co., 53 N. Y. Super. Ct. 255; Abbot v. Tolliver, 71 Wis. 64, 36 N. W. Rep. 622.

[1] Fulsome v. Concord, 46 Vt. 135; The William Branfoot, 48 Fed. Rep. 914.

[2] Houston, etc. R. Co. v. Willie, 53 Tex. 318, 37 Am. Rep. 756; McDonald v. Chicago, etc. R. Co., 26 Iowa, 124; Kinney v. Folkerts, 78 Mich. 687, 44 N. W. Rep. 152; Gregory v. New York, etc. R. Co., 55 Hun, 303, 8 N. Y. Supp. 525; Richmond v. Second Avenue R. Co., 76 Hun, 233, 239, 27 N. Y. Supp. 780; McDade v. Hoskins,

In ascertaining this period the jury may consider standard life and annuity tables; but it is error to instruct that these are an absolute guide.[1] Such tables are admissible where the injury is permanent, though it causes but a partial disability to labor.[2] On admitting the Carlisle tables the jury should be instructed that they are not entitled to serious weight unless the plaintiff has brought himself clearly within the class of selected lives tabulated. In Pennsylvania annuity tables are not admissible in actions to recover for personal injuries.[3] It has been ruled that, where the action is by a married woman for the recovery for pain she will probably endure, such tables are not admissible in evidence, though it is conceded that they would be admissible if the action was to recover for the loss of services.[4]

According to the better view the assessment of damages is not to be made on the theory that, but for the injury, the plaintiff might have engaged in a more lucrative employment than that in which he was engaged when injured.[5] But there are authorities to the contrary. In a case in the court of queen's bench in which a verdict for 5,000*l.* was returned, in answering the contention that the plaintiff's incapacity to earn a future improved income could not be considered, Cockburn, C. J., said that it would be really monstrous that because a young man has only arrived at a certain position — though from past experience you can see with tolerable certainty that

18 Vict. L. R. 417; Ritchie v. Victorian Railways Commissioner, 25 id. 272.

The present value of prospective earnings cannot properly be arrived at by ascertaining the entire amount and deducting seven per cent. therefrom. Macon, etc. R. Co. v. Moore, 99 Ga. 229, 25 S. E. Rep. 460.

[1] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. Rep. 1; Allen v. Ames College R. Co., 106 Iowa, 602, 76 N. W. Rep. 848; Stomne v. Hanford Produce Co., 108 Iowa, 137, 78 N. W. Rep. 841; Missouri, etc. R. Co. v. St. Clair, 21 Tex. Civ. App. 345, 51 S. W. Rep. 666; Waterman v. Chicago & A. R. Co., 82 Wis. 613, 52 N. W. Rep. 247; Indianapolis v. Marold, 25 Ind. App. 428, 437, 58 N. E. Rep. 512; Crouse v. Chicago & N. R. Co., 102 Wis. 196, 207, 78 N. W. Rep. 446; Galveston, etc. R. Co. v. Cooper, 2 Tex. Civ. App. 42, 48, 24 S. W. Rep. 269. See § 455.

[2] Gulf, etc. R. Co. v. Mangham, 95 Tex. 413, 67 S. W. Rep. 765, overruling Texas Mexican R. Co. v. Douglass, 69 Tex. 694, 7 S. W. Rep. 77.

[3] Kerrigan v. Pennsylvania R. Co., 194 Pa. 98, 44 Atl. Rep. 1069.

[4] Bigelow v. Metropolitan Street R. Co., 48 Mo. App. 367.

[5] Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. Rep. 837; Richmond v. Second Avenue R. Co., 76 Hun, 233, 239, 27 N. Y. Supp. 780; Reese v. Hershey, 163 Pa. 253, 29 Atl. Rep. 907, 43 Am. St. 795.

he will within a reasonable time greatly increase his income — you are to exclude this most important element from consideration. So far from thinking that it should be excluded, I think the very reverse should be the rule.[1]

In case the plaintiff dies from a cause other than the injuries sued for, and the action is revived in the name of his personal representative, the allowance of damages should not extend beyond his death.[2]

In Illinois an objection was made to a recovery because of future incapacity on the ground that the evidence did not show the earning ability of the plaintiff. The proposition was answered thus: It was manifest that it would have been incompetent to have proved what he had made in business prior to his injuries, since that was the result of circumstances that might never be repeated. He had no employment at fixed wages for the future, and he is not shown to have possessed peculiar skill or knowledge, having a definite pecuniary value, which was destroyed or affected by his injuries. What he or any other business man, however competent and skilled, might make in the future in any line of trade is too much a matter of speculation and contingency to be susceptible of direct evidence. It follows, therefore, that appellee gave all the evidence of the damages he has sustained on account of his permanent disability and consequent future inability to labor or transact business of which that question is susceptible. The inquiry, then, must be, whether, under such circumstances, a person is entitled to recover any damages because of inability to labor or transact business in the future, resulting from his injuries. We think, very clearly, that he is entitled to recover — that it can upon no principle make any difference whether a person is, at the time he is injured, engaged in a business paying a definite amount, or is then not engaged in business, but is by the act of injury prevented from engaging in business in the future in which he might reasonably expect, but not be entirely certain, that he would have success.[3]

[1] Fair v. London & N. W. R. Co., 21 L. T. Rep. (N. S.) 326; Chaminer v. Hill, 15 S. A. L. R. 84; Missouri, etc. R. Co. v. St. Clair, 21 Tex. Civ. App. 345, 51 S. W. Rep. 666.

[2] Atchison, etc. R. Co. v. Chance, 57 Kan. 40, 45 Pac. Rep. 60.

[3] Fisher v. Jansen, 128 Ill. 549, 21 N. E. Rep. 598. Compare Britton v. Street R. Co., 90 Mich. 159, 51 N. W.

The amount which may be recovered by an infant who has never earned anything and who does not possess the capacity to do labor, for the loss of his earnings after he shall have attained his majority, must, in the absence of direct evidence, be left to the judgment, common experience and enlightened conscience of the jurors under the facts,[1] subject to the power of the court to set aside the verdict if it was given under the influence of passion or prejudice.[2]

§ 1252. Husband's or parent's action. The action in such cases is generally for the pecuniary loss. A husband is entitled to the services[3] and society of his wife, and is bound to take care of and provide for her in sickness as well as in health.[4] Therefore any wrongful injury to her, by which he is deprived of her services or society, is a legal injury to him, although the circumstances which gave rise to the right of action arose out of a contract between the wife and a third party;[5] and [724] this injury is enhanced if he has been obliged to incur

Rep. 276. See Propsom v. Leatham, 80 Wis. 608, 50 N. W. Rep. 586.

[1] Rosenkranz v. Lindell R. Co., 108 Mo. 9, 18 S. W. Rep. 890, 32 Am. St. 588; Baker v. Irish, 172 Pa. 528, 533, 33 Atl. Rep. 558; Netherland American Steam Nav. Co. v. Hollander, 59 Fed. Rep. 417, 8 C. C. A. 169.

[2] St. Louis, etc. R. Co. v. Waren, 65 Ark. 619, 627, 48 S. W. Rep. 222.

[3] Services implies whatever of aid, assistance, comfort and society the wife would be expected to render to, or bestow upon, her husband, under the circumstances and in the condition in which they may be placed, whatever those may be. That services in the ordinary sense were not rendered at all would be immaterial and irrelevant, except as the fact might, under some circumstances, tend to show a want of conjugal regard and affection and thereby mitigate the damages. Cooley on Torts, 226; Kelley v. Mayberry, 154 Pa. 440, 447, 25 Atl. Rep. 595; Butler v. Manhattan R. Co., 143 N. Y. 417, 37 N. E. Rep. 826, 42 Am. St. 738, 26 L. R. A. 46.

The inability of the husband to support his wife in a particular condition does not defeat his right to recover for the loss of her services, though they were not living together, their separation not being the result of domestic troubles, nor an abandonment. Bowdle v. Detroit Street R. Co., 103 Mich. 272, 282, 61 N. W. Rep. 529, 50 Am. St. 366.

It is said in a Wisconsin case that the value of a wife's services is to be shown, not by what they were worth to the husband, but by their value generally. Keller v. Gilman, 93 Wis. 9, 12, 66 N. W. Rep. 800. But this has been modified and the general rule approved. Selleck v. Janesville, 104 Wis. 570, 80 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 691.

[4] Grant v. Green, 41 Iowa, 88.

[5] Blair v. Chicago & A. R. Co., 89 Mo. 334, 1 S. W. Rep. 367; McKinney v. Western Stage Co., 4 Iowa, 420; Cregin v. Brooklyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459.

expenses for her cure.[1] He has also been held entitled to recover the sum paid by him for necessary labor and services substituted for the ordinary service of the wife, and for his own services in attending upon her.[2] The recovery under the latter head cannot exceed the value of the services of a competent nurse; the loss to the husband is not to be regarded.[3] The married women's enabling statutes have not released them from their common-law and scriptural obligation and duty to be helpmeets to their husbands, and have not affected the latter's right to recover for the loss of their services.[4] Where such statutes are in force the husband's right to the services of the wife is limited to those which reasonably devolve upon her by reason of the marriage relation.[5] The fact that prior to the injury the wife had applied her earnings, realized for services

[1] Fuller v. Naugatuck R. Co., 21 Conn. 557; Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670; Kavanaugh v. Janesville, 24 Wis. 618; Filer v. New York Central R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Barnes v. Hurd, 11 Mass. 59; McKinney v. Western Stage Co., 4 Iowa, 420; Rogers v. Smith, 17 Ind. 323; Mowry v. Cheney, 43 Iowa, 609; Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618; Tuttle v. C., R. I. & P. R. Co., 42 Iowa, 518; Smith v. St. Joseph, 55 Mo. 456, 17 Am. Rep. 660; Berger v. Jacobs, 21 Mich. 215; Matteson v. New York Central R. Co., 35 N. Y. 487, 91 Am. Dec. 67; Eden v. Lexington, etc. R. Co., 14 B. Mon. 204; Philippi v. Wolff, 14 Abb. Pr. (N. S.) 196; Stone v. Evans, 32 Minn. 243, 20 N. W. Rep. 149; Nier v. Missouri Pacific R. Co., 12 Mo. App. 35; Martin v. Southern Pacific Co., 130 Cal. 285, 62 Pac. Rep. 515; Denver Consolidated Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. Rep. 476; Southern Kansas R. Co. v. Pavey, 57 Kan. 521, 530, 46 Pac. Rep. 969; Henry v. Klopper, 147 Pa. 178, 23 Atl. Rep. 337; Washington & G. R. Co. v. Hickey, 12 D. C. App. Cas. 269.

Such injuries, resulting from a defect in a highway, do not give the husband a statutory right of action under a statute providing therefor in case of an injury to his "person or property." Lounsbury v. Bridgeport, 66 Conn. 360, 34 Atl. Rep. 93.

Prospective damages for loss of wife's services are recoverable. Hodsoll v. Stallebrass, 11 Ad. & E. 301; Fox v. Saint John, 23 N. B. 244.

[2] Smith v. St. Joseph, 55 Mo. 456, 17 Am. Rep. 660; Blair v. Chicago & A. R. Co., 89 Mo. 334, 1 S. W. Rep. 367; Lindsey v. Danville, 46 Vt. 144; Martin v. Southern Pacific Co., 130 Cal. 285, 62 Pac. Rep. 515; Union Pacific R. Co. v. Jones, 21 Colo. 340, 40 Pac. Rep. 891; Riley v. Lidtke, 49 Neb. 139, 68 N. W. Rep. 356; Selleck v. Janesville, 104 Wis. 570, 80 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 691. See § 1250.

[3] Howells v. North American Transportation & T. Co., 24 Wash. 689, 64 Pac. Rep. 786. See § 1250.

[4] Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618; Omaha, etc. R. Co. v. Chollette, 41 Neb. 578, 592, 59 N. W. Rep. 921; Richmond R. & E. Co. v. Bowles, 92 Va. 738, 24 S. E. Rep. 388.

[5] Omaha, etc. R. Co. v. Chollette, *supra*.

to others than the members of the family, to its support, does not give the husband a right to recover for the loss of such earnings.[1] It is within the discretion of the jury to allow interest on the money actually paid by the husband for medical attendance, medicine, and nursing for his wife.[2] So far as the husband suffers loss in being deprived of his wife's services, and being put to expense by her illness, the loss is pecuniary; but he is also entitled to her society. The wrong may entitle him to substantial compensation though the parties are in such circumstances that she is not accustomed or desired to do physical labor;[3] or the husband may not have realized anything from her services before she was injured.[4] If she is voluntarily ren-

[1] Riley v. Lidtke, 49 Neb. 139, 68 N. W. Rep. 356.

[2] Washington & G. R. Co. v. Hickey, 12 D. C. App. Cas. 269.

[3] Blair v. Chicago & A. R. Co., 89 Mo. 334, 1 S. W. Rep. 367; Indianapolis Street R. Co. v. Robinson, 157 Ind. 414, 61 N. E. Rep. 936; Ainley v. Manhattan R. Co., 47 Hun, 206; Denver Consolidated Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. Rep. 476; Metropolitan Street R. Co. v. Johnson, 91 Ga. 466, 18 S. E. Rep. 816; Allen v. Manhattan R. Co., 60 N. Y. Super. Ct. 230, 17 N. Y. Supp. 187; Kelley v. Mayberry, 154 Pa. 440, 25 Atl. Rep. 595; Platz v. McKean, 178 Pa. 601, 36 Atl. Rep. 136; Gainesville, etc. R. Co. v. Lacy, 86 Tex. 244, 248, 24 S. W. Rep. 269, quoting the text; Selleck v. Janesville, 104 Wis. 570, 80 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 691, citing the text. See first note to this section.

In Furnish v. Missouri Pacific R. Co., 102 Mo. 669, 22 Am. St. 800, 15 S. W. Rep. 315, it is held that the husband is entitled to his wife's society as she was before she was injured. By the term "society" is meant such capacities for usefulness, aid and comfort as a wife as she possessed at the time of the injury. The nature of the damage resulting from the loss of a wife's society does not admit of direct proof of value; the fact of loss being shown the assessment is committed to the discretion of a jury. Where the husband expended $800 in the care and treatment of his wife, she being wholly disabled, a verdict for $5,000 was sustained, there being no demand for compensation because of loss of service. Gainesville, etc. R. Co. v. Lacy, 86 Tex. 244, 24 S. W. Rep. 269, is to the same effect.

It is said in a recent case that loss of a wife's society, companionship and solace are too sentimental and intangible for the law to measure. Hawkins v. Front Street Cable R. Co., 3 Wash. 592, 595, 28 Pac. Rep. 1021, 28 Am. St. 72, 16 L. R. A. 808.

[4] "There need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any other period of time, or of any aggregate sum." Metropolitan Street R. Co. v. Johnson, 91 Ga. 466, 472, 18 S. E. Rep. 816; Indianapolis Street R. Co. v. Robinson, 157 Ind. 414, 61 N. E. Rep. 936.

While the value of the aid, comfort and society of a wife cannot be proved in terms of dollars and cents, they have a pecuniary value to the husband, and for their loss he is not to be denied a remedy because of the fact that he cannot show the extent

dering service for her husband by carrying on his business he is entitled to recover for the loss of her services therein, if the facts are properly alleged.[1] But he is not entitled to recover for her pain and suffering; she must sue with her husband for such elements of the injury.[2] In such action there may be a

of their pecuniary value. He may place before the jury the ages of his wife and himself, their conditions for the enjoyment of life before and after the wrong done her. With these facts before them, the jury are to determine, in the light of their common experience, what is just and equitable in the premises, and the right of the husband is not affected by the previous recovery by the wife for the pain and suffering she has undergone. Per Woodward, J., in Zingrebe v. Union R. Co., 56 App. Div. 555, 67 N. Y. Supp. 554. In this case the husband was aged forty-seven, the wife forty-eight. She was so injured that there was no probability of her contributing anything of importance to his aid, comfort or society. A verdict for $7,250 was sustained. In Cannon v. Brooklyn City R. Co., 14 N. Y. Misc. 400, 35 N. Y. Supp. 1039, a verdict in favor of the husband for $10,000 was sustained by the city court of Brooklyn.

[1] Citizens' Street R. Co. v. Twiname, 121 Ind. 375, 23 N. E. Rep. 159, 7 L. R. A. 352. See Holcomb v. Harris, 166 N. Y. 257, 59 N. E. Rep. 820.

[2] Hyatt v. Adams, 16 Mich. 180; Michigan Central R. Co. v. Coleman, 28 id. 440; Brooks v. Schwerin, 54 N. Y. 343; Filer v. New York Central R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Hunter v. Ogden, 31 Up. Can. Q. B. 132; Reeder v. Purdy, 41 Ill. 279; Union Pacific R. Co. v. Jones, 21 Colo. 340, 40 Pac. Rep. 891.

In Minick v. Troy, 19 Hun, 253, it was held that in an action by a married woman she might recover for such loss of service as she sustained herself and towards herself. On this point Bockes, J., said: "Here, in effect, the jury were instructed that they should not allow such consequential damages as might result to the plaintiff's husband from her inability to labor. In this case, unlike Brooks v. Schwerin, 54 N. Y. 343, the plaintiff was engaged in no separate business or employment; still there remained to her many duties, privileges and services, *personal to herself*, which were proper subjects for the consideration of the jury, in connection with the suffering endured, in determining the damages to be awarded to her."

By the effect of certain statutes married women have in some states the right to sue alone for the damages for personal injury, so far as they are themselves affected. Chicago, etc. R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606; Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Hennies v. Vogel, 66 Ill. 401; Pancoast v. Bumell, 32 Iowa, 394; Musselman v. Gallagher, id. 383. See Gibson v. Gibson, 43 Wis. 23, 29, 28 Am. Rep. 527.

The damages recoverable for her injuries, in a joint action, belong to the husband when recovered, and he may release them. Southworth v. Packard, 7 Mass. 95; Ballard v. Russell, 33 Me. 196, 54 Am. Dec. 620; Shaddock v. Clifton, 22 Wis. 114.

Under statutes providing in effect that any person receiving any bodily injury through any defect in or want of repair of a highway may have a right of action against the town, a husband has not been permitted to maintain a separate action

recovery for such pain and suffering as it is reasonably certain will be endured in the future.[1] The husband cannot recover for his own mental distress on account of his wife's suffering,[2] nor for speculative losses, as by being deprived of prospective offspring.[3] His action will not abate by her death,[4] and is not affected by the recovery of judgment by her for her own injuries.[5] The elements of damage which form the basis of recovery in a suit by the husband alone are not to be considered when he joins with his wife for an injury to her.[6] It is held, however, in states in which the right to sue for a tort is property, and where all property acquired by either spouse, otherwise than by gift, bequest, devise or descent, is common or community property, that the chose in action arising from an injury to the wife is suable by the husband when he is vested with the right of disposing of the community personalty. In such a case the wife is a proper but not a necessary party,[7] though it is otherwise in Texas.[8] In these states all the damages naturally flowing from the wife are recoverable.[9] The husband's right to recover to the extent of

for any consequences of an injury to his wife. The action is given only to the party injured, and husband and wife must join to recover for injuries to her. Harwood v. Lowell, 4 Cush. 310; Starbird v. Frankfort, 35 Me. 89.

In Sanford v. Augusta, 32 Me. 536, it was held that, in order to give the statute the beneficial effect for which it was designed, the jury might allow, in such joint action, compensation for loss of time from the injury to the wife and the reasonable expenses incurred to obtain a cure.

[1] Louth v. Thompson, 1 Pennewill, 149, 39 Atl. Rep. 1100; § 1251.

[2] Hyatt v. Adams, 16 Mich. 180; Fillebrown v. Hoar, 124 Mass. 580; Missouri Pacific R. Co. v. Martino, 2 Tex. Civ. App. 634, 18 S. W. Rep. 1066, 21 id. 781; Texas & P. R. Co. v. Woods, 15 Tex. Civ. App. 612, 40 S. W. Rep. 846.

[3] Butler v. Manhattan R. Co., 143 N. Y. 417, 37 N. E. Rep. 826, 42 Am. St. 738, 26 L. R. A. 46.

[4] Hyatt v. Adams, *supra;* Eden v. Lexington, etc. R. Co., 14 B. Mon. 204; Green v. Hudson River R. Co., 28 Barb. 9; Nixon v. Ludlam, 50 Ill. App. 273. See Long v. Morrison, 14 Ind. 509.

[5] Selleck v. Janesville, 104 Wis. 570, 80 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 570; Zingrebe v. Union R. Co., 56 App. Div. 555, 67 N. Y. Supp. 554.

[6] Ohio & M. R. Co. v. Cosby, 107 Ind. 32, 7 N. E. Rep. 373; Louth v. Thompson, *supra.*

[7] Hawkins v. Front Street Cable R. Co., 3 Wash. 592, 28 Pac. Rep. 1021, 28 Am. St. 72, 16 L. R. A. 808; Ezell v. Dudson, 60 Tex. 331; McFadden v. Santa Anna, etc. R. Co., 87 Cal. 464, 25 Pac. Rep. 681, 11 L. R. A. 252.

[8] San Antonio, etc. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. Rep. 607.

[9] Hawkins v. Front Street, etc. R.

the injury done is not affected by the probable duration of his life,[1] nor is it to be diminished by the necessary cost of her maintenance.[2] In Pennsylvania it is required by statute that the rights of both husband and wife shall be adjusted in a joint action brought by them, and that a separate verdict and judgment shall be rendered if both recover. A mistake in awarding the damages due to the wrong party is not ground of complaint by the defendant.[3] In New Jersey a personal injury which disqualifies a married woman from carrying on the business in which she is engaged vests in her the right to recover damages sustained in respect to her separate business.[4]

The parent's action for injury to his child is one for loss of services, and expenses of the illness and cure,[5] including his own time spent in taking care of the child,[6] and also that of

Co., *supra;* Galveston, etc. R. Co. v. Baumgarten, 72 S. W. Rep. 78 (Tex. Ct. of Civ. App.); Martin v. Southern Pacific Co., 130 Cal. 285, 62 Pac. Rep. 515; Missouri Pacific R. Co. v. Martino, 2 Tex. Civ. App. 634, 18 S. W. Rep. 1066, 21 id. 781; Campbell v. Harris, 4 Tex. Civ. App. 636, 23 S. W. Rep. 35; International, etc. R. Co. v. Anthony, 24 Tex. Civ. App. 9, 57 S. W. Rep. 897.

[1] International, etc. R. Co. v. Anthony, *supra.*

[2] San Antonio, etc. R. Co. v. Belt, *supra.*

[3] Helsel v. Traction Co., 14 Pa. Super. Ct. 420.

[4] Healey v. Ballentine, 66 N. J. L. 339, 49 Atl. Rep. 511.

[5] Dennis v. Clark, 2 Cush. 347, 48 Am. Dec. 671; Durden v. Barnett, 7 Ala. 169; Cartanos v. Ritter, 3 Duer, 370; Whitney v. Hitchcock, 4 Denio, 461; Hall v. Hollander, 7 Dowl. & R. 133; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Karr v. Parks, 44 Cal. 46; Durkee v. Central Pacific R. Co., 56 Cal. 388, 38 Am. Rep. 59; Frick v. St. Louis, etc. R. Co., 75 Mo. 542; Evansich v. Railway Co., 57 Tex. 123; County Com'rs v. Hamilton, 60 Md. 340, 45 Am. Rep. 739; Barnes v. Keene, 132 N. Y. 13, 29 N. E. Rep. 1090, quoting the text; Seltzer v. Saxton, 71 Ill. App. 229; Buck v. People's Street R. etc. Co., 46 Mo. App. 555, 568; Woeckner v. Erie Electric Motor Co., 182 Pa. 182, 37 Atl. Rep. 936; McGarr v. National & P. Worsted Mills, — R. I. —, 53 Atl. Rep. 320, 60 L. R. A. 122.

The loss of the services of a minor son whose earnings contributed to the support of his family is a damage within the meaning of a statute giving a right of action on a liquor dealer's bond to any person injured or damaged in his person, property or means of support, although such earnings were not necessary to keep the family from becoming dependent. Reath v. State, 16 Ind. App. 146, 44 N. E. Rep. 808.

[6] County Com'rs v. Hamilton, 60 Md. 340, 45 Am. Rep. 739; Connell v. Putnam, 58 N. H. 534.

In South Carolina an instruction that if the father had lost contract wages while caring for his injured child they might be recovered, but speculative and uncertain earnings could not, was held to be as liberal to the plaintiff as the law allows. Bridger v. Asheville & S. R. Co., 27

his daughter and wife,[1] and the increased cost of its care and nurture on account of the injury.[2] In Pennsylvania the increased inconvenience and trouble caused other members of the family by the injury are not ground for recovery. "The duties performed by them in the care of the injured child cost the plaintiff nothing and caused him no pecuniary loss, and they cannot be made a ground of recovery by him."[3] The better view seems to be that such services were rendered by the plaintiff in the discharge of his duty to lessen the damages, and that they were, in point of law, rendered to the defendant and for his benefit. The right of a parent to recover for the loss of his son's services during minority is not affected by the fact that the latter has recovered therefor in an action brought by himself.[4] If a female becomes of age for some purposes at an earlier date than for general purposes, the recovery for loss of services may be co-extensive with the age at which her majority is attained for the latter.[5] It has been held that a deduction must be made from the probable gross earnings equal to the expense of board, lodging and clothing for the minor.[6] This proposition has been departed from for the very good reason that a parent is bound to support his minor child regardless of his earnings. The latter case was one in which there was loss of a regular salary, and it was held that the wages which would have been received were not to be diminished because of the expense of support.[7] If a statute makes the father of adult children liable for medical care for them if they are too poor to pay therefor, he may re-

S. C. 456, 3 S. E. Rep. 860, 13 Am. St. 653.

It is error to allow a parent to testify that he lost lucrative employment in order to nurse his child. Barnes v. Keene, 132 N. Y. 13, 29 N. E. Rep. 1090. See § 1250.

[1] Schmitz v. St. Louis, etc. R. Co., 46 Mo. App. 380; Blackwell v. Hill, 76 id. 46, 54.

[2] Lang v. New York, etc. R. Co., 51 Hun, 603, 4 N. Y. Supp. 565.

[3] Woeckner v. Erie Electric Motor Co., 182 Pa. 182, 186, 37 Atl. Rep. 936. See § 1250.

[4] Texas & P. R. Co. v. Morin, 56 Tex. 133, 18 S. W. Rep. 503; Forsyth v. Central Manuf. Co., 103 Tenn. 497, 53 S. W. Rep. 731, citing the text.

[5] Hussey v. Ryan, 64 Md. 426, 54 Am. Rep. 722.

[6] Matthews v. Missouri Pacific R. Co., 26 Mo. App. 75, 87.

[7] Mauerman v. St. Louis, etc. R. Co., 41 Mo. App. 348; Texas & P. R. Co. v. Morin, 66 Tex. 133, 18 S. W. Rep. 503; Birkel v. Chandler, 26 Wash. 241, 66 Pac. Rep. 406; Schmitz v. St. Louis, etc. R. Co., 46 Mo. App. 381.

cover the money reasonably paid for such care and the expenses connected therewith.[1]

The recovery of damages must be controlled substantially by what the proof shows the loss to be.[2] Where the evidence showed that a boy aged five years would have been worth to his father from the time he became ten or eleven years of age $100 per year, a verdict for $4,500 was set aside.[3] But this strictness is not always observed.[4] A reasonable rule is that the damages for loss of services rest in the sound discretion of the jury, if the case is such that direct proof thereof cannot be made.[5] Where the injury was to a bright boy of fourteen years, who was going to school at the time it occurred and was learning easily and well, and who, as a result of the wrong done him, became stupid and nervous, and sometimes delirious, requiring careful nursing and medical attendance, with a prospect of continued epilepsy and ultimate premature death, a verdict for $5,000 was sustained. The expenses incurred up to the time of the trial aggregated $500 or $600.[6] In England the weight of authority is to the effect that in an action by a parent for injuries to a minor child under his care, the *gravamen* is the loss of service, as incidental to which he may recover the expense of nursing and healing the child; though if the child be of such tender years as to be incapable of rendering any service whatever there can be no recovery even for the expenses.[7] But in this country a more liberal rule has been adopted; and the best considered cases hold that

[1] Union Pacific R. Co. v. Jones, 21 Colo. 340, 347, 40 Pac. Rep. 891.

[2] Texas & P. R. Co. v. Morin, Schmitz v. St. Louis, etc. R. Co., *supra;* Goodrich v. Burlington, etc. R. Co., 97 Iowa, 521, 66 N. W. Rep. 770.

In Reese v. Hershey, 163 Pa. 253, 29 Atl. Rep. 907, 43 Am. St. 795, the plaintiff's son was earning two dollars and a half a week when injured. Without any proof that he was likely to earn more, the court suggested that he might do so by way of promotion. Held, error. See § 1251.

[3] Hurt v. St. Louis, etc. R. Co., 94 Mo. 255, 4 Am. St. 374, 7 S. W. Rep. 1; Matthews v. Missouri Pacific R. Co., 26 Mo. App. 75.

[4] Dollard v. Roberts, 130 N. Y. 269, 29 N. E. Rep. 104, 14 L. R. A. 238; Buck v. People's Street R. etc. Co., 46 Mo. App. 555, 568.

[5] Seltzer v. Saxton, 71 Ill. App. 229; Blackwell v. Hill, 76 Mo. App. 46, 55.

In Baltimore, etc. R. Co. v. Keck, 89 Ill. App. 72, a verdict was set aside because it awarded excessive damages.

[6] Strohm v. New York, etc. R. Co., 32 Hun, 20.

[7] Grinnell v. Wells, 7 Man. & G. 1041; Add. on Torts, 902.

On this principle the mother of a

inasmuch as it is a duty enjoined by the law of the land, as well as by the laws of nature, upon the parent to care for and heal his injured minor child, he who wilfully or negligently occasioned the injury should be held responsible for the expenses incurred, without reference to the capacity of the child to render service to the parent.[1] The latter may recover for an injury to his child if that results in loss by being put to damage and expense in the care and cure of the child, though there was no loss of the child's services, and notwithstanding it dies; but the recovery must be limited to the damages sustained before death.[2] The parent's right of action for an injury to his minor child is not affected because, at the time of the injury, he was serving a term in the chain gang for the violation of law, such term expiring before he attained his majority.[3] The recovery must be limited to such expenses as have been actually incurred, or which are immediately necessary to be incurred.[4] Wounded feelings of the parent cannot [726] be taken into consideration,[5] nor can exemplary damages be recovered.[6] The parent's action is thus restricted on the ground that a child has a right of action and may recover full damages, except such as are thus allowed to be recovered

minor cannot recover for her services in attending him and for moneys expended in medical attendance, nursing and supplies, she not being in the legal relationship of master to him or under legal liability for his support. Wilson v. Boulter, 26 Ont. App. 184, 194.

[1] Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. Rep. 65; Dennis v. Clark, 2 Cush. 347, 48 Am. Dec. 671; Sykes v. Lawler, 49 Cal. 237, 238; Netherland-American Steam Nav. Co. v. Hollander, 59 Fed. Rep. 417, 8 C. C. A. 169; Clark v. Bayer, 32 Ohio St. 300, 30 Am. Rep. 593; Durden v. Barnett, 7 Ala. 169.

[2] Trow v. Thomas, 70 Vt. 580, 41 Atl. Rep. 652.

[3] Amos v. Atlanta R. Co., 104 Ga. 809, 31 S. E. Rep. 42.

[4] Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. Rep. 65; Karr v. Parks, *infra*.

[5] Cowden v. Wright, 24 Wend. 429, 35 Am. Dec. 633; Pennsylvania R. Co. v. Kelly, 31 Pa. 372; County Com'rs v. Hamilton, 60 Md. 340, 45 Am. Rep. 739; Baltimore, etc. R. Co. v. Keck, 89 Ill. App. 72, 78. But see Trimble v. Spiller, 7 T. B. Mon. 394, 18 Am. Dec. 189, and Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

[6] Baltimore, etc. R. Co. v. Keck, *supra*.

In Whitney v. Hitchcock, 4 Denio, 461, it was held in trespass for assault and battery upon the child or servant of the plaintiff that the damage was the actual loss which the plaintiff had sustained; that exemplary damages could not be given, though the assault was of an indecent character and under circumstances of great aggravation.

by the parent.[1] For the abduction of a minor child the parent may recover for reasonable expenses incurred in its pursuit, though no evidence be given that the act was malicious.[2] If the injuries cause instantaneous death the father cannot recover for loss of services,[3] and if they do not produce that immediate result his recovery therefor cannot extend beyond the child's life.[4]

§ 1253. Exemplary damages. Where the action is brought by one who suffered the injury in his own person exemplary damages may be allowed where the doctrine of such damages prevails, if the wrong was done with malice or with reckless indifference to consequences.[5] There is much conflict of de-

[1] Whitney v. Hitchcock, *supra*. The case of Karr v. Parks, 44 Cal. 46, is thus stated in the opinion: "It appears from the evidence that the daughter of plaintiff, between ten and eleven years of age, was attacked and gored by the defendant's cow. A wound was inflicted upon her face which destroyed the sight of the right eye and lachrymal duct, and tore the lower lid from its attachment at the inner corner of the eye. She was immediately placed in the care of a surgeon, under whose treatment the wound healed; but there remained an eversion of the lower eyelid, which was an unseemly disfigurement of the face. The larger portion of the expense for which the plaintiff sought to recover was incurred in the endeavor to remove this disfigurement. For this purpose the child was taken to San Francisco and two surgical operations were performed — the first being an entire failure, and the other partially successful. The amount of the verdict found by the jury renders it certain that the expenses attending these operations entered largely into their estimate of damages. . . . There was evidence tending to show that the restoration of the eyelid to its normal condition would add to the child's comfort by affording protection to the eye. But the discomfort was the unavoidable result of the injury received, for which the child could recover compensation in her own suit, as she could for the immediate pain and suffering caused by the wound. There would be practically no limit to the liability of the defendant if the father could pursue at pleasure a series of expensive surgical operations for the purpose of removing every trace of the injury and charge the defendant with the entire cost."

[2] Rice v. Nickerson, 9 Allen, 478, 85 Am. Dec. 777.

[3] Ohnmacht v. Mount Morris Electric Light Co., 66 App. 482, 73 N. Y. Supp. 296.

[4] Davis v. St. Louis, etc. R. Co., 53 Ark. 117, 7 L. R. A. 285, 13 S. W. Rep. 801.

[5] Harrison v. Ely, 120 Ill. 83, 11 N. E. Rep. 334; Alabama, etc. R. Co. v. Frazier, 93 Ala. 45, 9 So. Rep. 303; Badostain v. Grazide, 115 Cal. 425, 47 Pac. Rep. 118; Kirton v. North Chicago Street R. Co., 91 Ill. App. 554; Webb v. Rothschild, 49 La. Ann. 244, 21 So. Rep. 258; Thillman v. Neal, 88 Md. 525, 42 Atl. Rep. 242; Crosby v. Humphreys, 59 Minn. 92, 60 N. W. Rep. 843; Canfield v. Chicago, etc. R. Co., 59 Mo. App. 354; Sloan v. Speaker, 63 id. 321; Pierce v. Carpenter, 65 id.

cision as to the allowance of such damages, and the reader is [727] referred to the chapter on that subject.[1] In actions for assault and battery, where the latter is proved and there is no justification or palliation, the plaintiff has a right to a fair compensation for the injury actually sustained, and this compensation, as we have seen, should include remuneration for bodily and mental pain, loss of time from any disability and the expenses of cure. The mental pain which will be considered for compensation is not only that which results from the corporal hurt, but also the insulting or humiliating incidents of the wrong as perpetrated.[2] The jury should be instructed to consider the entire transaction.[3] The circumstances which would induce the allowance of punitory damages in one jurisdiction will elsewhere be generally considered as aggravations to enhance damages for compensation.[4] Where there are such aggravations it is generally held admissible to show the wealth and social position of the parties to affect damages therefor.[5] Any facts may be proven to enhance damages which tend to

191; Lyddon v. Dose, 81 id. 64; White v. Barnes, 112 N. C. 323, 16 S. E. Rep. 922; Hendricks v. Fowler, 16 Ohio Ct. Ct. 597; Sargent v. Carnes, 84 Tex. 156, 19 S. W. Rep. 378; Nichols v. Brabazon, 94 Wis. 549, 69 N. W. Rep. 342; Lamb v. Stone, 95 Wis. 254, 70 N. W. Rep. 72; Rauma v. Lamont, 82 Minn. 477, 85 N. W. Rep. 236; Germolus v. Sausser, 83 Minn. 141, 85 N. W. Rep. 946; Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 512, 14 So. Rep. 495; Louisville & N. R. Co. v. Long, 94 Ky. 410, 22 S. W. Rep. 747; Hanlish v. Boller, 72 App. Div. 559, 75 N. Y. Supp. 992.

[1] Ch. 9.

[2] Root v. Sturdivant, 70 Iowa, 55, 29 N. W. Rep. 802; Remmler v. Shenuit, 15 Mo. App. 192; Tatnall v. Courtney, 6 Houst. 434; Sampson v. Henry, 11 Pick. 379; Thillman v. Neal, 88 Md. 525, 42 Atl. Rep. 242.

In Draper v. Baker, 61 Wis. 450, 21 N. W. Rep. 527, 50 Am. Rep. 143, a verdict for $1,200 was sustained for spitting in a woman's face in a public place in the presence of a large number of persons.

[3] Frost v. Pinkerton, 61 App. Div. 566, 70 N. Y. Supp. 892.

[4] See Ford v. Cheever, 105 Mich. 679, 63 N. W. Rep. 975, as to the recovery by a wife of exemplary damages or damages in the nature thereof under the civil damage act.

[5] Sampson v. Henry, 11 Pick. 379; Webb v. Gilman, 80 Me. 177, 13 Atl. Rep. 688; Sloan v. Edwards, 61 Md. 89; Beck v. Dowell, 40 Mo. App. 71, 111 Mo. 506, 20 S. W. Rep. 209, 33 Am. St. 547 (pecuniary condition of the plaintiff); Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. Rep. 1010, 15 Am. St. 923, 4 L. R. A. 500; Draper v. Baker, 61 Wis. 450, 50 Am. Rep. 142, 21 N. W. Rep. 527; Brown v. Evans, 17 Fed. Rep. 912; Dailey v. Houston, 58 Mo. 361; Rowe v. Moses, 9 Rich. 423; Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. Rep. 53; Hendricks v. Fowler, 16 Ohio Ct. Ct. 597. See McKenzie v. Allen, 3 Strobh. 546; Reeder v. Purdy,

show actual malice. The plaintiff may show previous threats, and for this purpose it is immaterial whether he knew of them before the assault or not.[1] Evidence of threats and abusive language uttered in reference to the plaintiff fourteen hours after the assault was committed is admissible to show express malice.[2] In some states exemplary damages may be mitigated in an action for trespass *vi et armis* by proof of the payment of a fine imposed in a criminal prosecution for the act which is the basis of the civil proceeding; but a conviction does not bar the right to recover such damages.[3] The general rule is that such a payment does not affect the amount which may be awarded as exemplary damages.[4] It is within the discretion of the jury to include, as part of the damages, a reasonable attorney fee in favor of the plaintiff, but evidence as to the amount thereof is not admissible.[5]

§ 1254. Pecuniary and other circumstances of the parties. The general rule is that compensatory damages are not affected by the financial circumstances of either party to the action or the number or ages of the plaintiff's children,[6] or

41 Ill. 279; Tatnall v. Courtney, 6 Houst. 434; § 404.

[1] Bartram v. Stone, 31 Conn. 159; Treat v. Barber, 7 Conn. 279.

[2] Spear v. Sweeney, 88 Wis. 545, 60 N. W. Rep. 1060.

[3] Flanagan v. Womack, 54 Tex. 45; § 402; Rhodes v. Rodgers, 151 Pa. 634, 24 Atl. Rep. 1044; Jackson v. Wells, 13 Tex. Civ. App. 275, 35 S. W. Rep. 528.

[4] Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; Cook v. Ellis, 6 Hill, 466, 41 Am. Dec. 757; Read v. Kelly, 4 Bibb, 400; Wheatley v. Thorn, 23 Miss. 62; Phillips v. Kelly, 29 Ala. 628; Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582; McWilliams v. Bragg, 3 Wis. 424; § 402; Roach v. Caldbeck, 64 Vt. 593, 24 Atl. Rep. 989.

[5] Hudson v. Voigt, 15 Ohio Ct. Ct. 391.

[6] Pennsylvania Co. v. Roy, 102 U. S. 451; Sesler v. Rolfe Coal & C. Co., — W. Va. —, 41 S. E. Rep. 216; La Salle v. Thorndike, 7 Ill. App. 282; Pittsburg, etc. R. Co. v. Powers, 74 Ill. 341; Moody v. Osgood, 50 Barb. 628, 60 id. 644; Georgia R. & B. Co. v. Benton, — Ga. —, 45 S. E. Rep. 70; Kansas City, etc. R. Co. v. Eagan, 64 Kan. 421, 67 Pac. Rep. 887; Shea v. Potrere, etc. R. Co., 44 Cal. 415; Kansas, etc. R. Co. v. Painter, 9 Kan. 621; McKenzie v. Allen, 3 Strobh. 546; Joliet v. Conway, 119 Ill. 489, 10 N. E. Rep. 223; Stephens v. Hannibal, etc. R. Co., 96 Mo. 207, 9 S. W. Rep. 589; Louisville & N. R. Co. v. Gower, 85 Tenn. 465, 3 S. W. Rep. 824; Rooney v. Milwaukee Chair Co., 65 Wis. 397, 27 N. W. Rep. 24; Vosburg v. Putney, 78 Wis. 84, 47 N. W. Rep. 99; Overholt v. Vieths, 93 Mo. 422, 6 S. W. Rep. 74, 3 Am. St. 557; Southern R. Co. v. McLellan, 32 So. Rep. 283 (Miss.); Coffin v. Spencer, 2 Hawaiia, 23; Louisville & N. R. Co. v. Collinsworth, 33 So. Rep. 513 (Fla.); Dallas v. Moore, 74 S. W. Rep. 95 (Tex. Ct. of Civ. App.); Louisville & N. R. Co. v. Hall, 7 id. 280 (Ky.); Junction

the public position of the defendant at the time an assault was committed.[1] There are some exceptions. Thus, in Iowa it is held that a person who is permanently disabled may show that his only means of support were his earnings;[2] and in Maryland that the pecuniary circumstances of the plaintiff and the extent and dependent condition of his family may be considered by the jury in arriving at his damages.[3] In Missouri in an action by a married woman who is not living with her husband and who supports herself by her own labor, it is proper for the jury to consider her age and condition.[4] In South Carolina the plaintiff in an action to recover for a personal injury may testify as to the number of his children and their ages for the purpose of showing that the injury deprives him of the capacity to meet his obligation to provide for them.[5] It has been decided in North Carolina in an action by a child for personal injury that it was competent to show that the plaintiff had no property and no source of income, such proof being made in connection with proof of wages current in the locality, though the child was but three years old when injured.[6]

City v. Blades, 1 Kan. App. 85, 41 Pac. Rep. 677; Parsons v. Lindsay, 26 Kan. 426; Roach v. Caldbeck, 64 Vt. 593, 24 Atl. Rep. 989; Baltimore & O. R. Co. v. Camp, 81 Fed. Rep. 807, 26 C. C. A. 626; Louisville & N. R. Co. v. Binion, 107 Ala. 645, 18 So. Rep. 75; Galion v. Lauer, 55 Ohio St. 392, 45 N. E. Rep. 1044; Missouri, etc. R. Co. v. Hannig, 91 Tex. 347, 43 S. W. Rep. 508; Missouri Pacific R. Co. v. Lyde, 57 Tex. 505; Crouse v. Chicago & N. R. Co., 102 Wis. 196, 78 N. W. Rep. 446; Schwanzer v. Brooklyn Heights R. Co., 18 App. Div. 205, 45 N. Y. Supp. 889; Standard Oil Co. v. Tierney, 96 Ky. 89, 27 S. W. Rep. 983.

In Devir v. Curley, 3 N. S. W. L. R. 322 (1882), it was held that the plaintiff might show that his family were dependent upon him for support. The chief justice said: It is a gratification to any one to be able to maintain his family and a cause of anxiety not to be able to do so. Though this gratification is not one which can be measured in money, it is one of which the plaintiff has been deprived. His anxiety of mind may have been greatly increased by the consciousness that he is now unable to maintain his family, and this anxiety may, I think, be taken into account in estimating the damages to which he is entitled. If there is no authority in favor of this view, it is high time that a precedent should be made. In doing so we are not running counter to any rule of law. The other judges agreed.

[1] Hare v. Marsh, 61 Wis. 435, 21 N. W. Rep. 267, 50 Am. Rep. 141.

[2] § 1248.

[3] Sloan v. Edwards, 61 Md. 89; Gaither v. Blowers, 11 id. 536.

[4] Brake v. Kansas City, 75 S. W. Rep. 191 (Kansas City Ct. of App.).

[5] Youngblood v. South Carolina & G. R. Co., 60 S. C. 9, 38 S. E. Rep. 232.

[6] Jeffries v. Seaboard Air Line R. Co., 129 N. C. 236, 39 S. E. Rep. 836.

The general rule prevails in an action by a parent to recover for the loss of the services of a minor child.[1] The plaintiff cannot prove the value of his time to his family.[2] In actions in which insult and mortification bear a large proportion to the injury inflicted the jury may in Missouri, Mississippi and Illinois consider the financial circumstances of both parties.[3] The court say in the Illinois case: "It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessaries of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured."[4] This doctrine has no application in an action against a city to recover for the consequence of its negligence.[5]

§ 1255. Evidence in mitigation. In actions for assault and battery matters of provocation cannot be admitted in mitigation unless they happen at the time of the assault or immediately preceding it, so as to form part of the transaction.[6] The provocation, to entitle it to be proven for that purpose, must

[1] Holdridge v. Mendenhall, 108 Wis. 1, 9, 83 N. W. Rep. 1109.

[2] Austin v. Ritz, 72 Tex. 391, 9 S. W. Rep. 884.

[3] Eltringham v. Earhart, 67 Miss. 488, 19 Am. St. 319, 7 So. Rep. 346; McNamara v. King, 7 Ill. 432; Beck v. Dowell, 111 Mo. 506, 511, 33 Am. St. 547, 20 S. W. Rep. 209; Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88; Dailey v. Houston, 58 Mo. 361; Smith v. Butler, 48 Mo. App. 663 (plaintiff's condition). Compare Berryman v. Cox, 73 id. 61. See Hendricks v. Fowler, 16 Ohio Ct. Ct. 597.

[4] See Mullin v. Spangenberg, 112 Ill. 140, 145, where it is said: Evidence of this character, even when offered by the plaintiff for the purpose of enhancing the damages, is held inadmissible by many courts and text writers of high standing, but, nevertheless, we have recognized the contrary rule, and have no disposition to depart from it; but under the present state of the authorities we are not inclined to extend the rule.

[5] Jackson v. Pool, 91 Tenn. 448, 19 S. W. Rep. 324.

[6] Willis v. Forrest, 2 Duer, 310; Corning v. Corning, 6 N. Y. 97; Chambers v. Porter, 5 Cold. 273; Avery v. Ray, 1 Mass. 12; Tatnall v. Courtney, 6 Houst. 434; City Electric R. Co. v. Shropshire, 101 Ga. 33, 38, 28 S. E. Rep. 508; Hanson v. Urbana & C. El. Street R. Co., 75 Ill. App. 474; Munday v. Landry, 51 La. Ann. 303, 25 So. Rep. 66; Haman v. Omaha Horse R. Co., 35 Neb. 74, 52 N. W. Rep. 830. See § 151.

be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.[1] The defendant may show that the plaintiff immediately before charged him with a crime,[2] and no inquiry can be permitted concerning the truth or falsity of the charge.[3] If the parties fight voluntarily that fact may be shown in reduction of punitive, but not to affect compensatory, damages.[4] On this question the courts which permit the recovery of exemplary damages are not in harmony. Some of them permit proof of oral provocation to mitigate compensatory damages;[5] others hold that it can affect only punitive damages.[6] It has been suggested that an

[1] Heiser v. Loomis, 47 Mich. 16, 10 N. W. Rep. 60; Genung v. Baldwin, 75 App. Div. 195, 77 N. Y. Supp. 679; Gronan v. Kukkuck, 59 Iowa, 18, 12 N. W. Rep. 748; Lee v. Woolsey, 19 Johns. 319, 10 Am. Dec. 230; Chandler v. Newton, 13 Ky. L. Rep. 927 (Ky. Super. Ct.); Shapiro v. Michelson, 19 Tex. Civ. App. 615, 47 S. W. Rep. 746 (in mitigation of exemplary damages); Carson v. Singleton, 23 Ky. L. Rep. 1626, 65 S. W. Rep. 821.

[2] Bartram v. Stone, 31 Conn. 159; Bauman v. Bean, 57 Mich. 1, 23 N. W. Rep. 451.

[3] Bartram v. Stone, 31 Conn. 159; Grace v. Dempsey, 75 Wis. 313, 43 N. W. Rep. 1127, applying the rule to an action for false imprisonment. See Bull v. Gould, 34 Ind. 552; Marker v. Miller, 9 Md. 338.

[4] Grotton v. Glidden, 84 Me. 589, 24 Atl. Rep. 1008, 30 Am. St. 513; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Logan v. Austin, 1 Stew. 426; Bell v. Hansley, 3 Jones, 131; Commonwealth v. Colberg, 119 Mass. 350; Shay v. Thompson, 59 Wis. 540, 18 N. W. Rep. 473, 48 Am. Rep. 538.

[5] Genung v. Baldwin, 77 App. Div. 584, 79 N. Y. Supp. 569, following Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543; Palmer v. Winston-Salem R. & E. Co., 131 N. C. 250, 42 S. E. Rep. 604; Daniel v. Giles, 108 Tenn. 242, 66 S. W. Rep. 1128; Robison v. Ruper, 23 Pa. 523; Frazer v. Berkeley, 7 C. & P. 789; Perkins v. Vaughan, 5 Scott N. R. 881; Linford v. Lake, 3 H. & N. 275; Cushman v. Ryan, 1 Story, 100; Avery v. Ray, 1 Mass. 12; Lee v. Woolsey, 19 Johns. 241; Maynard v. Berkeley, 7 Wend. 560, 22 Am. Dec. 595; Corcoran v. Harran, 55 Wis. 120, 12 N. W. Rep. 468; Mowry v. Smith, 9 Allen, 67; Tyson v. Booth, 100 Mass. 258; Bonino v. Caledonio, 144 id. 299, 11 N. E. Rep. 98; Burke v. Melvin, 45 Conn. 243; Thrall v. Knapp, 17 Iowa, 468; Crosby v. Humphreys, 59 Minn. 92, 60 N. W. Rep. 843; Hayes v. Sease, 51 S. C. 534, 29 S. E. Rep. 259. See § 151.

[6] Osler v. Walton, 67 N. J. L. 63, 50 Atl. Rep. 590; Scott v. Fleming, 16 Ill. App. 539; Armstrong v. Rhoades, 53 Atl. Rep. 435 (Del.); Goldsmith v. Joy, 61 Vt. 488, 17 Atl. Rep. 1010, 15 Am. St. 923, 4 L. R. A. 500; Donnelly v. Harris, 41 Ill. 126; Gizler v. Witzel, 82 id. 322; Johnson v. McKee, 27 Mich. 471; Prentiss v. Shaw, 56 Me. 712; Jacobs v. Hoover, 9 Minn. 204; Cushman v. Waddell, Baldwin, 57; McBride v. McLaughlin, 5 Watts, 375; Tatnall v. Courtney, 6 Houst. 434; Yeager v. Berry, 82 Mo. App. 534.

intimation in the Pennsylvania case cited, to the effect that the doctrine of punitive damages should be mutual, that it should apply to the conduct of the plaintiff as well as that of the defendant, seems to embody the correct principle. "Through punitive damages the community punishes the defendant by making him pay more than is necessary to compensate the plaintiff; through mitigation of damages it punishes the plaintiff by giving him less than will compensate him for the loss which he has suffered."[1] The difficulty with this view, aside from the ultra refinement it involves, is that the plaintiff is punished without cause — he may not have violated the law. The New Jersey court has said: A provocation that will not justify an assault should not excuse making compensation for the injury inflicted. It is enough that it may save or reduce a penalty *quasi*-criminal, which is the foundation of punitive damages.[2] Another objection is that to allow abusive language used to the plaintiff to mitigate actual damages would be virtually allowing it as a defense.[3] In Nebraska exemplary damages are not recoverable; neither are the pecuniary damages actually sustained to be mitigated by proof of provocation.[4] A defendant who has used excessive force in his defense may prove in mitigation that the plaintiff first assaulted him.[5] One called upon by a parent to aid in capturing a fleeing minor child may show in mitigation that he pursued and captured the plaintiff at the parent's request. This has a tendency to explain the defendant's conduct, and to mitigate any wrongful act done by him after capturing the boy.[6]

The bad character of the plaintiff cannot be proved in mitigation unless it in some way contributed to the provocation[7] or is in issue upon the question of damages.[8] Where a female

[1] 16 Harv. L. Rev. 591.

[2] Osler v. Walton, *supra.*

[3] Scott v. Fleming, *supra.*

[4] Mangold v. Oft, 63 Neb. 397, 88 N. W. Rep. 507.

[5] Chicago & A. R. Co. v. Randolph, 65 Ill. App. 208.

[6] Vanmeter v. True, 16 Ky. L. Rep. 320 (Ky. Super. Ct.).

[7] McKenzie v. Allen, 3 Strobh. 546. Thus, the defendant in an action for an assault and battery cannot show that the plaintiff was a fighting, high-tempered, quarrelsome man, who had previously assaulted him. Galbraith v. Fleming, 60 Mich. 403, 27 N. W. Rep. 581. But see third paragraph of next note.

Any benefit resulting to the plaintiff from a battery, as the loss of his teeth, cannot mitigate the defendant's liability. Hitchler v. Voelker, 8 Mo. App. 492.

[8] Ford v. Jones, 62 Barb. 484; Verry

plaintiff in an action for assault and battery made proof in aggravation of damages that the defendant took indecent liberties with her person and attempted to have sexual intercourse with her, it was held that her character for chastity was in issue on the question of damages and that it was competent to [729] disparage it by proving specific acts of lewdness and immorality.[1]

The injured party cannot recover damages which result from his own acts or want of care. He is required to observe proper precautions against increasing the injury, and to reasonably exert himself to obtain a cure.[2] Such part of the damages [730] he sustains as the defendant can show has resulted from the plaintiff's fault will be deducted from his recovery.[3] The

v. Watkins, 7 C. & P. 308; Indianapolis, etc. R. Co. v. Bush, 101 Ind. 582; Johnson v. Wells, etc. Co., 6 Nev. 224, 3 Am. Rep. 245. *Contra*, Abbot v. Tolliver, 71 Wis. 64, 36 N. W. Rep. 622. See § 94.

The defendant's character is not in issue in an action to recover for an assault and battery. Brown v. Evans, 17 Fed. Rep. 912. Even to the extent of his being a peaceable and orderly citizen. Elliott v. Russell, 92 Ind. 526.

Proof that the plaintiff was of a quarrelsome disposition and had an ungovernable temper must be made by evidence of his general reputation, and not by opinions based on the observation of the witnesses. Golder v. Lund, 50 Neb. 867, 70 N. W. Rep. 379.

[1] Ford v. Jones, 62 Barb. 484. See Parker v. Coture, 63 Vt. 155, 21 Atl. Rep. 494, 25 Am. St. 750, and the cases cited in Ford v. Jones.

[2] Moore v. Kalamazoo, 109 Mich. 176, 66 N. W. Rep. 1089; Toledo Electric Street R. Co. v. Tucker, 13 Ohio Ct. Ct. 411, 416; Mattis v. Philadelphia Traction Co., 6 Pa. Dist. Rep. 94; Vallo v. United States Exp. Co., 147 Pa. 404, 30 Am. St. 741, 14 L. R. A. 743, 23 Atl. Rep. 594; Kehoe v. Allentown, etc. Traction Co., 187 Pa. 474, 41 Atl. Rep. 310; Texas & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. Rep. 389.

The mere fact that a married woman became pregnant some weeks after being injured, no caution having been given her by her physician respecting the matter, does not as matter of law justify a reduction of the damages, although the results of the injury may thereby have been prolonged or her recovery retarded. Salladay v. Dodgeville, 85 Wis. 318, 55 N. W. Rep. 696, 20 L. R. A. 541.

[3] §§ 155, 156; Baldwin v. Lincoln County, 29 Wash. 509, 69 Pac. Rep. 1081; Geiselman v. Scott, 25 Ohio St. 86; Nashville, etc. R. Co. v. Smith, 6 Heisk. 174; Gould v. McKenna, 86 Pa. 297, 27 Am. Rep. 705; Gilman v. Holey, 7 Ill. App. 349; Moss v. Pardridge, 9 id. 490; Louisville, etc. R. Co. v. Falvey, 104 Ind. 409, 425, 3 N. E. Rep. 389, 4 id. 908; Goshen v. England, 119 Ind. 368, 21 N. E. Rep. 977, 5 L. R. A. 253; Crete v. Childs, 11 Neb. 252, 9 N. W. Rep. 55; Texas & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. Rep. 389; Texas & P. R. Co. v. White, 101 Fed. Rep. 928, 42 C. C. A. 86; Illinois Steel Co. v. Szutenbach, 64 Ill. App. 642; Bailey v. Centerville, 108 Iowa, 20, 78 N. W.

burden of proving an aggravation of the injury is upon the defendant.[1] One who seasonably employs a physician believed to be competent and exercises reasonable care in selecting him is not to be deprived of full compensation because the best means were not used to restore him to health.[2] In an action by a mother under a civil damage statute to recover damages by the sale of intoxicants to her minor son, it may be shown that the plaintiff had been in the habit of furnishing him liquor until he became intoxicated thereby. "The injury which the plaintiff sustained consisted mainly of the shame and mortification and mental anguish induced by discovery of the fact of her son's use of intoxicating liquor, and of his intoxication resulting from its use. It needs no argument to demonstrate that a mother who had herself been in the habit of furnishing intoxicating liquors to her minor son would not be affected by the discovery of such a wrong on the part of the defendant as is here counted on to any such degree as one who was not so lost to the sense of parental responsibility."[3] If the previous habits of the plaintiff had been such as to lessen the probability of a complete recovery from the effects of the injury, or to prolong or aggravate the suffering caused by it, the fact cannot be shown in mitigation of damages.[4] But it has been held that evidence as to the intoxication of the plaintiff at the time of the injury is competent as part of the *res gestæ*;[5] and of his intoxication on other occasions as bearing upon the question of his capacity to earn money, but for no other purpose.[6] In an action by a married woman on the bond of a

Rep. 831. See La Salle v. Thorndike, 7 Ill. App. 282; Foels v. Tonawanda, 59 Hun, 567, 14 N. Y. Supp. 46.

[1] Goshen v. England, *supra*.

[2] Reed v. Detroit, 108 Mich. 224, 65 N. W. Rep. 567; Collins v. Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200; Rice v. Des Moines, 40 Iowa, 644; Stover v. Bluehill, 51 Me. 441; Selleck v. Janesville, 100 Wis. 157, 75 N. W. Rep. 975, 41 L. R. A. 563, 104 Wis. 570, 579, 80 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 691; Loeser v. Humphrey, 41 Ohio St. 378, 52 Am. St. 86; Louisville, etc. R. Co. v. Falvey, 104 Ind. 411, 424, 3 N. E. Rep. 389, 4 id. 908; Pullman Palace Car v. Bluhm, 109 Ill. 20; Tuttle v. Farmington, 58 N. H. 13; Boynton v. Somersworth, id. 321; Lyons v. Erie R. Co., 57 N. Y. 489; Bardwell v. Jamaica, 15 Vt. 438.

[3] Cramer v. Danielson, 99 Mich. 531, 58 N. W. Rep. 476.

[4] Littlehale v. Dix, 11 Cush. 364; Sullivan v. Marin, 175 Mass. 422, 56 N. E. Rep. 600.

[5] Williams v. Edmunds, 75 Mich. 92, 42 N. W. Rep. 534.

[6] Kingston v. Fort Wayne, etc. R. Co., 112 Mich. 40, 45, 40 L. R. A. 131, 70 N. W. Rep. 315, 74 id. 230; Herrick v. Wixom, 121 Mich. 384, 390, 80 N.

liquor dealer to recover for the loss of means of support resulting from the sale of liquor to her husband, the fact that he drank to excess prior to the time the sales in question were made may be proved.[1] The fact that the plaintiff was committing a technical trespass on the lands of a third party does not mitigate the liability of an officer for an assault and battery in making an arrest.[2]

The right to recover damages for an intentional and unlawful assault and battery is not affected because the plaintiff took no care to avoid an invasion of his rights.[3] The damages for abducting a female child and causing her to be debauched may be mitigated by proof of the child's dissolute character and that of her family.[4] In actions to obtain damages for maiming, disfigurement or impairment of working capacity, if the injured person was employed in doing labor, or was able to fill an accustomed position, or any other to which he must resort as a consequence of the injury, everything which illustrates the effect thereof to lessen or enhance its prejudicial consequences is obviously admissible.[5] The injured person is not bound to work in order to mitigate the liability of the wrong-doer, though his ability to do so may be shown.[6] A corporation does not lessen its liability for an assault made by one of its servants because the latter had been fined therefor.[7] It is otherwise in some states where the defendant has been punished by a fine.[8] The fact that a person seriously and permanently hurt possesses mental qualifications and acquirements which enable him, temporarily at least, to earn more money than he previously received as wages, is not cause for reducing the amount recovered by him.[9] The fact that a person who has been injured in

W. Rep. 117, 81 id. 333; Union Pacific R. Co. v. Reese, 56 Fed. Rep. 288, 5 C. C. A. 510.

[1] Uldrich v. Gilmore, 35 Neb. 288, 53 N. W. Rep. 135.

[2] Lamb v. Stone, 95 Wis. 254, 70 N. W. Rep. 72.

[3] Steinmetz v. Kelly, 72 Ind. 442, 37 Am. Rep. 170; Whitehead v. Mathaway, 85 Ind. 85.

[4] Dobson v. Cothran, 34 S. C. 518, 13 S. E. Rep. 679.

[5] The Oriflamme, 3 Sawyer, 397; Louisville & N. R. Co. v. Carothers, 23 Ky. L. Rep. 1673, 65 S. W. Rep. 833. See § 1250.

[6] Missouri, etc. R. Co. v. Flood, 70 S. W. Rep. 331 (Tex. Ct. of Civ. App.).

[7] Hanson v. Urbana & C. El. Street R. Co., 75 Ill. App. 474.

[8] Armstrong v. Rhoades, 53 Atl. Rep. 435 (Del.). See § 402.

[9] Chicago City R. Co. v. Taylor, 68 Ill. App. 613, affirmed, 170 Ill. 49, 48 N. E. Rep. 831.

two accidents has recovered against the person liable for the first compensation for the damage sustained by the second does not mitigate the liability of the party responsible for the latter. This rule prevails though the plaintiff committed perjury in the action.[1] It is immaterial to the liability of the defendant that the plaintiff has received sick benefits from an organization of which he was a member.[2]

§ 1256. Province of the jury, and instructions thereto. There being no legal measure of damages for pain and suffering, the amount which a jury may award as compensation for these elements of damage in an action for a personal injury is peculiarly within their discretion. They should exercise a calm and dispassionate judgment, in view of all the facts established by the evidence, under the instructions of the court, supplemented by their knowledge, observation and experience in the affairs of life,[3] as applicable to the facts and circumstances proven.[4] The parties are entitled to the judgment of the jury, and it is not within the province of the court to decide on the amount of damages.[5] Though two previous verdicts rendered upon the same evidence have been set aside because excessive, the court cannot interpose to prevent a repetition of a finding of the same or a larger amount of damages.[6] The right to a verdict is not at all dependent upon offering affirmative evi-

[1] Post v. Hartford Street R. Co., 72 Conn. 362, 44 Atl. Rep. 547.

[2] Baltimore City Passenger R. Co. v. Baer, 90 Md. 97, 44 Atl. Rep. 992; § 158.

[3] Springfield Consolidated R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. Rep. 884; North Chicago Street R. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. Rep. 483; Baltimore, etc. R. Co. v. Keck, 84 Ill. App. 159, 169.

[4] North Chicago Street R. Co. v. Fitzgibbons, 79 Ill. App. 632, 637.

[5] Ward v. Blackwood, 48 Ark. 396, 3 S. W. Rep. 624; Georgia Pacific R. Co. v. Freeman, 83 Ga. 583, 10 S. E. Rep. 277; Kelsey v. Hay, 84 Ind. 189; Pittsburgh, etc. R. Co. v. Sponier, 85 id. 165; Redfield v. Redfield, 75 Iowa, 435, 39 N. W. Rep. 688; Chicago & A. R. Co. v. Fisher, 38 Ill. App. 33; Kimball v. Bath, 38 Me. 219, 61 Am. Dec. 243; McKinley v. Chicago, etc. R. Co., 44 Iowa, 322; Butler v. Bangor, 67 Me. 385; Jacobs v. Bangor, 16 id. 187, 33 Am. Dec. 652; Shartle v. Minneapolis, 17 Minn. 308; Wightman v. Providence, 1 Cliff. 530; Chicago v. Smith, 48 Ill. 107; Gale v. New York, etc. R. Co., 13 Hun, 1; Weisenberg v. Appleton, 26 Wis. 56; § 459; Richmond & D. R. Co. v. Allison, 89 Ga. 567, 16 S. E. Rep. 116, 11 L. R. A. 43; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 217, 9 So. Rep. 363. See Lane v. Holman, 145 Mass. 221, 13 N. E. Rep. 602.

[6] Illinois Central R. Co. v. Minor, 69 Miss. 710, 720, 11 So. Rep. 101, 16 L. R. A. 627.

dence of the damages suffered in dollars and cents.[1] Generally courts will not set aside verdicts on the ground that the damages are excessive or inadequate unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.[2] This doctrine has special force if the case calls for the allowance of punitive, as well as compensatory, damages.[3] One or other of the grounds of objection to the verdict must be suggested to the reviewing court "at the first blush."[4] But a verdict which awards an excessive or inadequate sum is subject to the control of the court; and where some of the elements of damage which might

[1] Bell v. Gulf & C. R. Co., 76 Miss. 71, 23 So. Rep. 268.

[2] Cases cited in first note to this section; Woodward v. Consolidated Traction Co., 17 Pa. Super. Ct. 576; Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 253; Stephens v. Hudson Valley Knitting Co., 48 N. Y. St. Rep. 814, 20 N. Y. Supp. 916; Hallack v. Johnson, 12 Colo. 244, 20 Pac. Rep. 700: Chicago, etc. R. Co. v. Barrett, 16 Ill. App. 17; East St. Louis & C. R. Co. v. Frazier, 26 id. 437; Welch v. McAllister, 15 Mo. App. 492; Honeycutt v. St. Louis, etc. R. Co., 40 id. 374; Bitner v. Utah Central R. Co., 4 Utah, 502, 11 Pac. Rep. 620; Corcoran v. Harran, 55 Wis. 120, 12 N. W. Rep. 468; Smalley v. Appleton, 75 Wis. 18, 43 N. W. Rep. 826; McLean v. Lewiston, 69 Pac. Rep. 478 (Idaho); Coffin v. Varila, 8 Tex. Civ. App. 417, 420, 27 S. W. Rep. 956, quoting the text; Morgan v. Southern Pacific Co., 95 Cal. 501, 30 Pac. Rep. 601, 17 L. R. A. 71; Lee v. Same, 101 Cal. 118, 35 Pac. Rep. 572; Clare v. Sacramento Electric Power & L. Co., 122 Cal. 504, 55 Pac. Rep. 326; Roche v. Redington, 125 Cal. 174, 57 Pac. Rep. 890; East Tennessee, etc. R. Co. v. King, 88 Ga. 443, 14 S. E. Rep. 708; Illinois Central R. Co. v. Cheek, 152 Ind. 663, 678, 53 N. E. Rep. 641; Frankfort v. Coleman, 19 Ind. App. 368, 375, 49 N. E. Rep. 474; Lauter v. Duckworth, 19 Ind. App. 535, 543, 48 N. E. Rep. 864; Mt. Vernon v. Hoehn, 22 Ind. App. 282, 287, 53 N. E. Rep. 654; Indianapolis v. Marold, 25 Ind. App. 428, 58 N. E. Rep. 512; Donnelly v. Booth, 90 Me. 110, 37 Atl. Rep. 874; St. Joseph, etc. R. Co. v. Hedge, 44 Neb. 448, 461, 62 N. W. Rep. 887; Finletter v. Philadelphia Traction Co., 19 Phila. 413; Galveston, etc. R. Co. v. Hynes, 21 Tex. Civ. App. 34, 50 S. W. Rep. 624; Richmond R. & E. Co. v. Garthright, 92 Va. 627, 635, 24 S. E. Rep. 267, 32 L. R. A. 220; Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 136, 25 S. E. Rep. 226, 53 Am. St. 839; Norfolk v. Johnakin, 94 Va. 285, 26 S. E. Rep. 830; Smith v. Pittsburgh & W. R. Co., 90 Fed. Rep. 783; Lambkin v. Southeastern R. Co., 5 App. Cas. 352, reversing the judgment of the queen's bench division which awarded a new trial on the ground of the excessiveness of the damages.

The fact that the jury awarded $3,000 more than the plaintiff's counsel suggested in his closing argument is not conclusive as to the existence of passion or prejudice. Oglesby v. Missouri Pacific R. Co., 150 Mo. 137, 162, 37 S. W. Rep. 829.

[3] N. M. & M. V. R. Co. v. Dentzel's Adm'r, 12 Ky. L. Rep. 626, 14 S. W. Rep. 958.

[4] Howland v. Oakland Consolidated Street R. Co., 110 Cal. 513, 523, 42 Pac. Rep. 983.

have been considered by the jury have been ignored and the verdict is for a less amount than the plaintiff is clearly entitled to, it will be set aside, although there has been no misdirection by the court or misconduct or miscalculation on the part of the jury.[1] The same reluctance is manifested against setting a verdict aside because of the inadequacy of the amount awarded as exists where the objection is that the award is excessive.[2] It will be assumed that the jury found every fact to mitigate or reduce the damages which the evidence warranted.[3]

There is no absolute rule to determine whether a verdict awards an excessive amount or not. It has been held that if the sum allowed is much above or greatly below the average that it is fair to infer, unless the case presents extraordinary features, that partiality, prejudice, or some other improper motive has led the jury astray.[4] And if there have been two or more trials of an action and the evidence has not been materially different as to the extent of the plaintiff's injuries a large discrepancy between the final and the previous awards will authorize the reversal of a judgment for an amount greatly in excess of that first awarded.[5] But the application of this rule depends upon the fact that the evidence is substantially the same on each trial.[6] If two verdicts have been returned

[1] Phillips v. Southwestern R. Co., 4 Q. B. Div. 406, s. c. *sub nom.* Phillips v. London, etc. R. Co., 5 id. 78; Moseley v. Jamison, 68 Miss. 336, 8 So. Rep. 744; Smith v. Dittman, 16 Daly, 427, 11 N. Y. Supp. 769; Hanson v. Urbana & C. El. Street R. Co., 75 Ill. App. 474.

[2] McGowan v. Interstate Consolidated Street R. Co., 20 R. I. 264, 38 Atl. Rep. 497; Archibald v. Pruden, 7 Vict. L. R. (law) 422.

[3] McDermott v. Chicago & N. R. Co., 85 Wis. 102, 55 N. W. Rep. 179; Robinson v. Waupaca, 77 Wis. 544, 46 N. W. Rep. 809.

[4] Rueping v. Chicago, etc. R. Co., — Wis. —, 93 N. W. Rep. 843; Jennings v. Van Schaick, 13 Daly, 7; Lockwood v. Twenty-third Street R. Co., 15 id. 374, 7 N. Y. Supp. 663; Atchison, etc. R. Co. v. Rowe, 56 Kan. 411, 43 Pac. Rep. 683.

[5] Baker v. Madison, 62 Wis. 137, 22 N. W. Rep. 141, 583; Richmond & D. R. Co. v. Allison, 89 Ga. 567, 16 S. E. Rep. 116, 58 Am. St. 319; Chatsworth v. Rowe, 66 Ill. App. 55. See McLimans v. Lancaster, 63 Wis. 596, 23 N. W. Rep. 689.

In Louisville Water Co. v. Upton, 18 Ky. L. Rep. 326, 36 S. W. Rep. 520, the first verdict, for $10,000, was set aside because excessive. A second verdict was for $6,750; this was set aside for the same reason. The third verdict was for $3,000, and was sustained on a cross-appeal by the plaintiff from the judgment rendered on the last verdict, the court of appeals refusing to interfere with the setting aside of the second verdict.

[6] Bridge v. Oshkosh, 71 Wis. 363, 37 N. W. Rep. 409; Harold v. New York, etc. R. Co., 13 Daly, 378.

in the same action for the same sum the second will not be disturbed.[1] It is error to charge that decisions of the supreme court touching particular sums awarded by other juries as damages should be considered by the jury.[2] Elsewhere in this chapter are collected notes giving the amounts which have been awarded in various cases in which the principal elements of damage have been pain and suffering,[3] or loss of capacity to pursue business.[4] In a note hereto appended is given the result of the action of the courts in a considerable number of cases in which exceptions have been urged to judgments on the ground that the awards were excessive. The effort has been to include a variety of cases from a large number of courts, rather than to make the note represent even a large portion of the whole number of recent cases.[5] In determining whether

[1] McDonald v. Postal Tel. Co., 22 R. I. 131, 46 Atl. Rep. 407.

[2] East Tennessee, etc. R. Co. v. King, 88 Ga. 443, 14 S. E. Rep. 708.

[3] § 1242.

[4] § 1246.

[5] *Damages where injuries permanent.* An injury to a woman in the prime of life whose pursuits required all her physical faculties and which permanently disabled her was not excessively compensated for by $3,500. Calder v. Smalley, 66 Iowa, 219, 23 N. W. Rep. 638, 55 Am. Rep. 270.

A verdict for $5,000 for injuries which permanently destroyed the use of a lower limb of a healthy, active woman of seventy years was sustained. Hinton v. Cream City R. Co., 65 Wis. 323, 27 N. W. Rep. 147.

A verdict for $10,000 was sustained in favor of a miner aged twenty-four years for the loss of his right foot. Bowers v. Union Pacific R. Co., 4 Utah, 215. An award of $11,000 in favor of a man advanced in years for a like injury was sustained. Jordan v. New York & H. R. R. Co., 16 Daly, 130. And $12,000 in favor of a brakeman. Trinity & S. R. Co. v. Lane, 79 Tex. 643, 15 S. W. Rep. 477, 16 id. 18. And $10,000 in a case in which a brakeman was permanently injured in one leg and a shoulder. Daniels v. Union Pacific R. Co., 6 Utah, 357, 23 Pac. Rep. 762.

Where a miner aged thirty-six years, who had been before the injury in good health, was so hurt that his lower limbs were paralyzed to such an extent that he had but little use of them and could do nothing to help himself, a verdict for $20,000 was reduced to $15,000 by the trial court and affirmed for the latter sum. Reddon v. Union Pacific R. Co., 5 Utah, 344, 15 Pac. Rep. 262.

A verdict for $6,000 was sustained in favor of a man of twenty-five years who lost the use of his right arm and who was educating himself for an engineer and earning $56 per month, and whose earning power was reduced one-half. Howard Oil Co. v. Davis, 76 Tex. 630, 13 S. W. Rep. 665.

A recovery of $13,000 was upheld in favor of a man of thirty-nine years whose earnings were $100 a month, for the loss of both legs, one being amputated four or five inches below and the other above the knee.

an award is excessive the appellate court will regard the length of time that has elapsed since the injury was sustained,[1] the number of trials the case has had and the expense thereof to the plaintiff, so far as the defendant is responsible for these

Colorado Midland R. Co. v. O'Brien, 16 Colo. 219, 230, 27 Pac. Rep. 701.

Where an engineer of thirty-four years, in good health, endowed with a vigorous constitution and earning from $165 to $195 per month, was so injured as to be incapacitated for the performance of any profitable labor, bereft of his hearing and made a physical wreck, $15,000 was not an excessive award. Texas Pacific R. Co. v. Johnson, 76 Tex. 421, 13 S. W. Rep. 463.

A verdict for $6,000 was sustained where a man employed in coupling cars lost the use of one hand. Missouri Pacific R. Co. v. Jones, 75 Tex. 151, 16 Am. St. 879. And a $4,000 verdict was upheld where the flesh was torn from the thumb and finger of a carpenter. Galveston Oil Mills v. Malin, 60 Tex. 651.

Where a brakeman aged twenty-five lost his right hand at the wrist, and the case had been pending in the courts for nearly nine years, and two juries had awarded him substantially the same amount of damages, a judgment for $10,000 was affirmed. Union Pacific R. Co. v. Young, 19 Kan. 488.

A woman aged fifty-seven was permanently deprived of the use of her left arm, her power to move was impaired, a shoulder bone broken, her spine injured and her general health affected and her system rendered more liable to disease. A verdict for $5,000 was not excessive. Texas Pacific R. Co. v. Davidson, 68 Tex. 370, 4 S. W. Rep. 636.

A sailor aged thirty-two, earning from $12 to $20 a week, sustained a fracture of the ankle and a rupture, in consequence of which he was in a hospital eighty-five days; his injuries permanently incapacitated him for heavy work. The court awarded $6,500. Miller v. The W. G. Hewes, 1 Woods, 363; The D. S. Gregory, etc., 2 Bene. 226.

Where a physician negligently tied a ligature so tightly around the penis of a new-born child as to destroy nearly all the glands of that member, a verdict of $5,500 was sustained. When the actual damages, said the court, may include mental suffering through life, a verdict can rarely be set aside as excessive. Brooke v. Clarke, 57 Tex. 105.

In Groves v. Rochester, 39 Hun, 5, the suit was by a husband and his wife to recover for injuries to the latter, who was twenty-eight years of age when the accident occurred. The nature of the injuries is not fully disclosed by the report, except that they "were severe and her suffering has been very great. She still suffers from the effect of them; and medical opinion is that she may never fully recover, and that they may materially shorten her life." A verdict for $19,000 was sustained.

A railroad track foreman, aged thirty-five, had his right eye destroyed and suffered from the other eye at times; his ability to work was reduced about one-half. Judgment for $5,000 affirmed. Johnson v. Missouri Pacific R. Co., 96 Mo. 340, 9 S. W. Rep. 790, 9 Am. St. 351.

A man aged forty was so injured

[1] Zipperlein v. P. C. & St. L. R. Co., 8 Ohio Dec. 587; Smith v. Mauch Chunk, 3 Pa. Super. Ct. 495, 502.

things.[1] The damages based on the considerations last stated are allowed in lieu of interest, which is not recoverable as such.[2]

[731] It is the duty of the court to direct the jury whether

by a collision that, besides many lesser hurts, he sustained a concussion of the spine, which resulted in chronic inflammation of the membranes enveloping the spinal cord; his faculties, mental and physical, were largely impaired at the time of the trial, the probability being that paralysis and premature death would result. A verdict for $30,000 was sustained. Harrold v. New York E. R. Co., 24 Hun, 184.

A child aged nine was rendered lame for life by an injury to one of its legs. A verdict for $10,000 was sustained. Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

An infant aged nineteen months sustained an injury to his spine which resulted in an incurable disease, which would disable him from competition with laboring men, and probably shorten his life. An award of $7,500 was affirmed. Galveston City R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. Rep. 705, 60 Am. Rep. 32.

Where there was a loss of a foot and a sickness of three months at an expense of $750, a verdict for $20,750 was reduced to $10,750, the evidence showing that health was not endangered or that plaintiff was incapacitated from following his business as a bookkeeper. Kennon v. Gilmer, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. Rep. 847, 9 Mont. 108, 22 Pac. Rep. 248.

A verdict for $25,000 in favor of a switchman aged seventeen years who lost his left leg and right foot was reduced to $20,000 by a *remittitur* and affirmed. Waldhier v. Hannibal, etc. R. Co., 87 Mo. 37.

A verdict for $7,000 in favor of a switchman aged thirty, the father of a family, for the loss of one arm below the elbow, seemed large to the court but it was not disturbed. Sobieski v. St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. Rep. 863.

A child aged eight years had both eyes burned out, both ears burned off, his hands burned almost to a crisp — "in short, the mental and physical functions of his person almost completely destroyed — everything that would make life either enjoyable or useful gone, and nothing left but the capacity to exist." A verdict of $50,000 was reduced to $25,000, and then affirmed. Dunn v. Burlington, etc. R. Co., 35 Minn. 73, 27 N. W. Rep. 448.

In Shaw v. Boston & W. R. Corp., 8 Gray, 45, a woman lost one arm and the use of the other, and was much bruised and injured otherwise so as to greatly injure and impair her health and memory and cause constant pain. There were three trials which resulted in verdicts for $15,000, $18,000 and $22,250, respectively. The last amount was held not to be excessive.

The loss of the left arm just above the elbow by a girl of seven years is over-compensated by $12,000. The court reduced a verdict for that sum to $5,000. Lehman v. Louisiana W. R. Co., 37 La. Ann. 705. But where a boy of seven years, "the son of a

[1] Waterman v. Chicago & A. R. Co., 82 Wis. 613, 52 N. W. Rep. 247; Illinois Central R. Co. v. Harris, 63 Ill. App. 172.

[2] Zipperlein v. P. C. & St. L. R. Co., 8 Ohio Dec. 587; Smith v. Mauch Chunk, 3 Pa. Super. Ct. 495, 502.

they may consider the question of exemplary damages; when it is submitted the jury may allow them or not according to their judgment.[1] It will be error if the court withhold that question from the jury in a case proper for such damages,[2] and

laboring man, without property or means," was deprived of an arm, the court, though it at first thought the sum excessive, affirmed a judgment for $10,000. Ketchum v. Texas & P. R. Co., 38 La. Ann. 777.

A verdict for $8,000 as compensatory damages was sustained for the loss of a brakeman's leg, he being in the prime of young manhood, and unfitted for any employment save one of manual labor. L. & N. R. Co. v. Moore, 83 Ky. 675. In another case, not notably different, a verdict for $10,000 was sustained. Louisville & N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. Rep. 706.

A brakeman, aged twenty-four, lost a leg below the knee; in the absence of proof of what he was earning, of the loss resulting, the loss of time, or the extent of the impairment of his ability to earn money, $10,000 was held excessive; and the option given to remit $3,000 of the amount. Missouri Pacific R. Co. v. Dwyer, 36 Kan. 58, 12 Pac. Rep. 352. Compare Pennsylvania Co. v. Reidy, 99 Ill. App. 477, and Momence Stone Co. v. Groves, 100 id. 98.

The loss of the thumb and first finger of the right hand of a brakeman who was disabled for three or four months was over-compensated by a verdict for $6.500. Kansas Pacific R. Co. v. Peavey, 29 Kan. 169, 34 id. 472, 8 Pac. Rep. 780.

A brakeman aged twenty-seven, earning $60 per month, lost a leg below the knee; it had to be sawed off three times; he was confined to his room more than fifty days; had lock-jaw for twelve or fifteen days, and suffered intensely. A verdict for $8,000 given on a former trial was increased to $10,000 on a retrial, and affirmed. Atchison, etc. R. Co. v. Moore, 31 Kan. 197, 1 Pac. Rep. 644. In another case not dissimilar except that the plaintiff was a locomotive fireman aged thirty-nine, a verdict for $12,000 was sustained. Missouri Pacific R. Co. v. Mackey, 33 Kan. 298, 6 Pac. Rep. 291.

In a late case a judgment for $15,000 for the loss of a leg was affirmed, the suffering resulting from repeated surgical operations being unusual. Chicago, etc. R. Co. v. Spurney, 97 Ill. App. 570.

A verdict for $8,000 was affirmed in favor of a brakeman aged nineteen years for an injury which affected his foot and ankle and made him a cripple for life. Henry v. Sioux City & P. R. Co., 75 Iowa, 84, 39 N. W. Rep. 193, 9 Am. St. 457.

A verdict for $8,250 was sustained where a farmer of sixty-five years had two or three ribs broken, so that they punctured one of his lungs to such an extent that air escaped therefrom and inflated the surrounding tissues. He was confined to his bed for three weeks and to his house for seven, and appeared to be permanently injured. Reed v. Chicago, etc. R. Co., 74 Iowa, 188, 37 N. W. Rep. 149.

A disability of the right arm of a railroad engineer forty years of age, earning $100 a month, who is not

[1] Myers v. San Francisco, 42 Cal. 215; Owen v. Brockschmidt, 54 Mo. 289. See § 403.

[2] Bass v. Chicago, etc. R. Co., 30 Wis. 636.

a verdict which includes them in a case where only compensation should be given will be set aside.[1] It is matter of law to determine the elements of damage. On the trial the evidence should not be permitted to embrace any elements not proper

fitted for any pursuit which would bring him one-third of that sum, was not excessively compensated for by $9,500. Knapp v. Sioux City & P. R. Co., 71 Iowa, 41, 32 N. W. Rep. 18.

A farmer aged fifty years had a thigh bone broken, and was confined to his bed nine weeks; the fracture did not join and the injured leg was shortened about two and one-half inches. A verdict for $8,000 sustained. Funston v. Chicago, etc. R. Co., 61 Iowa, 452, 16 N. W. Rep. 518.

In Rueping v. Chicago, etc. R. Co., — Wis. —, 93 N. W. Rep. 843, a verdict for $12,000 in favor of a man of forty-five who was engaged in office work for the compound fracture of a leg below the knee was regarded as unreasonably excessive; the court indicated that $3,500 was ample.

A compound fracture of the left arm of a laboring man and a partial dislocation of the elbow of the same arm, impairing its usefulness permanently, was not over-compensated by $4,000. Van Winter v. Henry County, 61 Iowa, 684, 17 N. W. Rep. 94.

Where the injury to a boy of seven years necessitated the amputation of both his legs a verdict for $30,000 was held to be considerably in excess of what was right. Heddles v. Chicago & N. R. Co., 74 Wis. 239, 42 N. W. Rep. 237. A second verdict for $18,500 was sustained. s. c., 77 Wis. 228, 46 N. W. Rep. 115. See Waterman v. Chicago & A. R. Co., 82 Wis. 613, 52 N. W. Rep. 247.

In Gulf, etc. R. Co. v. Shelton, 69 S. W. Rep. 653, one of the Texas courts of civil appeals sustained a verdict for $35,000 in favor of a man of forty-nine years who had lost both his legs, and more than $2,000 in one year because of his diminished capacity.

A physician was disabled from pursuing the practice of his profession, which brought him $2,000 a year, by an injury to his spine which caused great suffering and was so serious as to make it reasonably certain that his life would be shortened. The court affirmed a judgment for $10,000. Carthage Turnpike Co. v. Andrews, 102 Ind. 138, 1 N. E. Rep. 364, 52 Am. Rep. 653.

A verdict for $14,833 was held excessive where the plaintiff was aged twenty-one, and the injury was permanent; he was earning from $800 to $1,200 a year, and was deprived of employment by the accident. Southwestern R. v. Singleton, 66 Ga. 252.

The same court held a verdict for $13,750 to be "extreme if not excessive," where a boy of nine years lost an arm. Western & A. R. Co. v. Young, 83 Ga. 512, 10 S. E. Rep. 197.

A freight conductor's recovery of $6,500 for the loss of an arm at the shoulder was sustained in Chicago, etc. R. Co. v. Warner, 22 Ill. App. 62.

Where there was the loss of the second and third fingers of the left

[1] Chicago v. Langlass, 52 Ill. 256, 4 Am. Rep. 603; Chicago v. Kelly, 69 Ill. 475; Decatur v. Fisher, 53 id. 407; Keightlinger v. Egan, 65 id. 235; Chicago, etc. R. Co. v. McKittrick, 78 id. 619; Nashville, etc. R. Co. v. Smith, 6 Heisk. 174; Goodno v. Oshkosh, 28 Wis. 304; Patry v. Chicago, etc. R. Co., 77 id. 218, 46 N. W. Rep. 56 (setting aside a verdict because of error in authorizing such damages, though it was not certain that they were allowed).

to be considered; but incidentally on the trial of proper questions irrelevant matters sometimes creep in. By instructions the court should, as far as practicable, eliminate them, and direct the attention of the jury to those elements on which their es-

hand and an injury to the first finger of a man employed as a car-coupler at $45 a month, a verdict for $4,000 was sustained though it went to the extreme limit if not beyond it. Central R. & B. Co. v. Lanier, 83 Ga. 587, 10 S. E. Rep. 279.

A verdict for $4,700 was quite moderate for the loss of the right hand of a man of twenty-three years, he having sustained other severe wounds and bruises. Central R. v. De Bray, 71 Ga. 406; Grannis v. Chicago, etc. R. Co., 81 Iowa, 444, 46 N. W. Rep. 1067.

A verdict for $25,000 was sustained where a man of thirty years, employed as a conductor, was so injured as to be incurable, and suffered greatly from nervous prostration and debility, and had lost to a great extent the use of his lower limbs, and was troubled with gradual failure of mind and memory. Chicago, etc. R. Co. v. Holland, 18 Ill. App. 418.

Where a young man employed as a laborer in a saw-mill lost one of his legs above the knee $9,650 was not considered exorbitant. Nadau v. White River Lumber Co., 76 Wis. 120, 43 N. W. Rep. 1135, 20 Am. St. 29. And $7,500 was sustained for the loss of the right hand of a man whose life expectancy was forty-six years, and was similarly employed. Sprague v. Atlee, 81 Iowa, 1, 46 N. W. Rep. 756.

An employee on a gravel train retained a verdict for $8,000 for the loss of a leg near the thigh. Schumacher v. St. Louis, etc. R. Co., 39 Fed. Rep. 174.

The testimony tended to show that the injuries, a broken leg and bruised shoulder, were permanent in their nature, that for four years after they were sustained plaintiff had been able to labor but half the time, and his weight had been reduced thirty-five pounds. A verdict for $7,500 was sustained. Hallack v. Johnson, 12 Colo. 244, 20 Pac. Rep. 700.

A verdict for $5,000 was affirmed, after seriously questioning its correctness, where a switchman's hand was so injured that he could never use it naturally, and would never be able to do any kind of labor for which he could realize any considerable amount of wages. Before the injury plaintiff's earnings were $55 a month. Toledo, etc. R. Co. v. Fredericks, 71 Ill. 294.

A $3,000 judgment in favor of a boy of fourteen years for the loss of three fingers sustained. Neilon v. Marinette & M. Paper Co., 75 Wis. 579, 44 N. W. Rep. 772.

An award of $7,000 for the loss of a railroad laborer's leg was not excessive. Ohio & M. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134.

An injury to a woman of sixty years, which resulted in progressive paralysis and disabled her from following her business as a midwife (which was lucrative) was not excessively compensated for by $6,000. Wardle v. New Orleans, etc. R. Co., 35 La. Ann. 202.

A child of five years sustained the fracture of an arm, which became and remained disfigured at the elbow. A verdict for $6,600 was reduced to $3,000. Ryder v. Mayer, 50 N. Y. Super. Ct. 220.

Plaintiff was fifty-four years of age; three of his ribs were fractured, he had a crushing wound on the lower part of one leg, was injured above such wound, confined six or

timate should be made. It is error to submit such cases with the general instruction that they may find such damages as in their judgment, from the evidence in the cause, the plaintiff ought to recover; thus giving the jury free scope to give such

seven weeks and was troubled with pain on one side when he breathed, and was so troubled and lame at the time of the trial, nine months after the accident. A $5,000 verdict was sustained. Quinn v. Long Island R. Co., 34 Hun, 331.

In Standard Oil Co. v. Tierney, 92 Ky. 367, 36 Am. St. 595, 14 L. R. A. 677, 17 S. W. Rep. 1025, the court reversed a judgment for $25,000 in favor of a railroad conductor of thirty years who was burned about the face so as to disfigure him for life and whose left arm was permanently disabled; his right hand was also injured and his feet were badly burned. The court say: "It is by comparison with verdict after verdict in this state where more flagrant wrongs were committed and punitive damages claimed, in which juries composed of men, as we have the right to assume, of like intelligence, passion and feeling, have made their findings for a much less amount; and without enumerating the cases it will be found that $10,000 is the extent to which a verdict has been sustained by this court. . . . While we do not pretend to adjudge that no verdict would or ought to be sustained for a larger amount than $10,000, we do say that some moderation should be indulged in when arriving at verdicts in this class of cases." A second verdict for $20,000 was set aside. Standard Oil Co. v. Tierney, 96 Ky. 89, 27 S. W. Rep. 983.

In Brown v. Southern Pacific R. Co., 7 Utah, 288, 26 Pac. Rep. 579, the court refused to affirm a judgment for $10,000 in favor of a man of twenty-two years who lost a hand and received other injuries, and who had been earning $75 a month. He was not educated for a profession, but had so far recovered at the time of the trial as to be able to do light work. On remitting $6,000 the judgment was affirmed for the balance.

Where the injuries sustained by an able-bodied and industrious mechanic rendered him a physical and mental wreck, after great suffering, which would probably continue, a verdict for $20,000 was sustained. International, etc. R. Co. v. Brazzil, 78 Tex. 314, 14 S. W. Rep. 609.

In Hall v. Chicago, etc. R. Co., 46 Minn. 439, 49 N. W. Rep. 239, an able-bodied young railroad engineer was so injured as to be almost a cripple and was made an invalid for life. The suffering endured was very severe. A verdict for $40,000 was reduced to $25,000, and judgment for the latter amount was affirmed.

Judgment for $9,000 was sustained where a laborer in a quarry lost both eyes as the result of an explosion. Stearns v. Reidy, 33 Ill. App. 246. The Colorado court set aside a verdict for $37,500 in favor of a miner whose sight was destroyed. Deep Mining & Drainage Co. v. Fitzgerald, 21 Colo. 533, 45 Pac. Rep. 210.

In De La Vergne Refrigerating Machine Co. v. Stahl, 24 Tex. Civ. App. 471, 60 S. W. Rep. 319, a judgment for $8,000 for the loss of an eye by an employee of twenty-four years of age was reduced to $7,000.

A brakeman aged twenty-three years, earning from $500 to $600 a year, was made a physical wreck through the loss of one leg, the toes on the other foot, a dislocation of the hip and an injury to his chest. A verdict for $12,000 was sustained.

damages as, according to their individual notions of right and wrong, they might think the plaintiff ought to have, unguided by any legal rule as to the elements.[1] In a late Connecticut case[2] Loomis, J., said: "The parties made no requests

Kentucky Central R. Co. v. Ryle, 18 S. W. Rep. (Ky.) 938.

Where a female infant lost the sight of one eye and it was disfigured, a verdict for $7,000 was allowed to stand. Shaw v. Chicago & G. T. R. Co., 123 Mich. 629, 82 N. W. Rep. 618, 49 L. R. A. 308.

The plaintiff was badly burned and lost one eye; the sight of the other had been seriously impaired by a previous accident. Before the injury he earned $1.60 a day, and a few weeks after it earned from $15 to $20 a month. He was required to remit $5,000 from a verdict for $15,000. Ribich v. Lake Superior Smelting Co., 123 Mich. 401, 82 N. W. Rep. 279, 48 L. R. A. 649.

Where a young brakeman lost one foot and four toes on the other the court reduced a judgment for $8,000 one-half. Wood v. Louisville & N. R. Co., 88 Fed. Rep. 44.

Where a well and young man who was actually earning $3,000 a year suffered a great physical shock, had his hearing impaired and lost his sexual powers, though it was not certain these injuries would be permanent, and his income was reduced but $25 a month, a verdict for $12,000 was sustained. Macon Consolidated Street R. Co. v. Barnes, 113 Ga. 212, 38 S. E. Rep. 756.

As the result of a compound fracture of a leg the bone protruded through the flesh and was denuded of the periosteum. More than one hundred pieces of bone were taken out, and they continued to work out of the wound more than twenty months after the injury was inflicted. The expenses for medical attendance were large, and the lameness was probably permanent. A verdict for $15,000 was approved. Western U. Tel. Co. v. Engler, 75 Fed. Rep. 102, 21 C. C. A. 246. See Chitty v. St. Louis, etc. R. Co., 166 Mo. 435, 65 S. W. Rep. 959.

Where a boy of sixteen had one arm amputated and the other so injured that its use was permanently impaired, and was also injured on the head, a verdict of $20,000 was reduced to $12,000. Renne v. United States Leather Co., 107 Wis. 305, 83 N. W. Rep. 473.

An award of $10,000 for an injury necessitating the amputation of the left arm of a boy of nineteen was held not excessive. Baltzer v. Chicago, etc. R. Co., 89 Wis. 257, 60 N. W. Rep. 716.

Judgment for a like sum in favor of an experienced railroad man earning $80 a month, for the loss of a leg below the knee and other injuries, was affirmed. Yerkes v.

[1] Keightlinger v. Egan, 65 Ill. 235; Hawes v. Kansas City Stock Yards Co., 103 Mo. 10, 15 S. W. Rep. 751; Gulf, etc. R. Co. v. Head, 15 S. W. Rep. 504; McGowan v. St. Louis Ore & Steel Co., 109 Mo. 518, 531, 19 S. W. Rep. 199, quoting the text; Goss v. Missouri Pacific R. Co., 50 Mo. App. 614; Brink's Chicago City Exp. Co. v. Herron, 104 Ill. App. 269; Louisville & N. R. Co. v. Berry's Adm'x, 96 Ky. 604, 29 S. W. Rep. 449; Holt v. Spokane & P. R. Co., 35 Pac. Rep. 39 (Idaho). Compare Augusta & S. R. Co. v. Randall, 85 Ga. 297, 322, 11 S. E. Rep. 706; Griffin Wheel Co. v. Markus, 79 Ill. App. 82; West Chicago Street R. Co. v. Lups, 74 id. 420.

[2] Wilson v. Granby, 47 Conn. 47.

in relation to the damages. And it may not be perfectly clear that we ought to grant a new trial on account of the charge as given on this subject. It was, however, somewhat objectionable as not giving the jury any rule at all on the subject ex-

Northern Pacific R. Co., 112 Wis. 184, 88 N. W. Rep. 33.

Where a man of twenty-nine who was earning about $70 a month, and whose health had theretofore been good, had his thumb and index finger so mangled that they had to be amputated, with the result that a very large portion of the physical capacity of his wrist was lost, and the back of his hand was covered with "scar tissue," a verdict, rendered on the first trial, for $8,000 was reduced by the trial court to $6,000; the second verdict, for $10.500, was reduced by that court to $8,000, and further reduced by the supreme court to $6,500. Thompson v. Chicago, etc. R. Co., 71 Minn. 89, 98, 73 N. W. Rep. 707.

Under quite novel circumstances a female passenger on a train was struck by a bullet in the side of her face, the bones of the nostril and other small bones of the face being broken; after passing between the spinal cord and the large veins of the neck the bullet lodged in the back of the neck, with the result that the face was partially paralyzed, one nostril closed, and she was permanently disfigured. A verdict for $18,000 was set aside. Louisville & N. R. Co. v. McEwan, 17 Ky. L. Rep. 706, 31 S. W. Rep. 465.

A verdict for $6,565 for injuries permanently and completely disabling, and leaving in a condition of suffering, a woman of forty-four, who had previously done all her housework and earned from $6 to $12 per week besides, was not disturbed. Miller v. Boone County, 95 Iowa, 5, 63 N. W. Rep. 352.

A verdict for $1,500 for a lacerated wound on the face and neck of a girl of eighteen, causing a permanent scar and pain and suffering, was sustained. Cameron v. Bryan, 89 Iowa, 214, 56 N. W. Rep. 434.

The sum of $10,000 was not regarded as too much where a woman of forty-one, who had been able to do all ordinary housework, was injured so that her eyes were affected, her range of vision contracted, the heart action made irregular, and she suffered from nervous prostration, her condition being permanent. Illinois Central R. Co. v. Treat, 75 Ill. App. 327. In North Chicago Street R. Co. v. Fitzgibbons, 79 id. 632, a verdict for a like sum was sustained, the result of the injury being similar.

In Illinois Central R. Co. v. Souders, 79 Ill. App. 41, a verdict for $20,000 in favor of a woman of fifty-four, who had kept boarders, and who had suffered much for four years and was permanently disabled, was upheld.

A verdict for $7,000 for injuries of a subjective nature, except for a brief time, in favor of a woman aged fifty-nine, whose earnings did not exceed $15 a week, was reduced one-half. Chicago City R. Co. v. Anderson, 182 Ill. 298, 55 N. E. Rep. 366.

Where a man of twenty-five years, earning $50 a month as a flagman on a train, was injured in the spine, and suffered greatly, a verdict for $10,500 was not excessive. Alabama, etc. R. Co. v. Bailey, 112 Ala. 167, 20 So. Rep. 313.

A verdict for $9,000 in favor of a farmer aged forty years, whose earnings were about $500 a year, for the loss of a foot was sustained. Georgia

cept 'their own sense of right and justice,' and that, too, in a case where sympathy for the plaintiff would naturally produce a powerful effect. There was danger that the jury might take the charge as meaning that their power over the

R. & B. Co. v. Keating, 99 Ga. 308, 25 S. E. Rep. 699.

Where a child of two and one-half years had both hands cut off and one leg and foot lacerated and seriously injured, and had not been able to walk at the time of the trial, a verdict for $40,000 was set aside. St. Louis, etc. R. Co. v. Waren, 65 Ark. 619, 627, 48 S. W. Rep. 222.

In a case in which there was great injury to the right arm and shoulder, some of the internal ligaments of the shoulder joint being seriously ruptured, the plaintiff having suffered great pain for two years, her memory being impaired, and she being unable to perform services of any value, a verdict for $15,000 was not disturbed. Morgan v. Southern Pacific Co., 95 Cal. 501, 30 Pac. Rep. 601, 17 L. R. A. 71.

A judgment for $6,000 was affirmed in favor a man of seventy-two, who was crippled and infirm as the result of a previous injury, but who, up to the time of the injury complained of, had his normal powers of speech and was a good penman. Such injury deprived him, to a considerable extent, of these faculties, impaired his power to move about, and caused him continuous pain, which seriously interfered with his sleep. Illinois Central R. Co. v. Wheeler, 50 Ill. App. 205.

A verdict for $15,000 for injuries to a child of nine which necessitated the amputation of one its legs was sustained. Roth v. Union Depot Co., 13 Wash. 525, 546, 43 Pac. Rep. 641, 31 L. R. A. 855.

A verdict for $7,000 in favor of an unmarried woman of thirty-five, and excellent health, for injuries causing great pain and which disabled her for active exercise and permanently shattered her nervous system, was upheld. Illinois Central R. Co. v. Robinson, 58 Ill. App. 181.

A judgment for $10,000 in favor of an employee in a brick manufacturing establishment for the loss of an arm did not shock the reviewing court's sense of remedial justice. Chicago Anderson Pressed Brick Co. v. Rembarz, 51 Ill. App. 543. And so of one for $8,000 in favor of a brakeman for the loss of a hand. Illinois Central R. Co. v. Harris, 63 Ill. App. 172. But it was otherwise as to a verdict for $20,000 for the loss of an arm in favor of a man of twenty who was earning $1 per day when injured, and afterward secured employment at $35 per month. Chicago & N. R. Co. v. Kane, 70 Ill. App. 676. In Illinois Central R. Co. v. O'Connor, 90 id. 142, a judgment for $15,000 for the loss of an arm was sustained.

A verdict for $20,000 was sustained where there was a loss of a portion of both legs, the plaintiff having been in a hospital almost a year. Fonda v. St. Paul City R. Co., 77 Minn. 336, 79 N. W. Rep. 1043.

A verdict for $10,500 was sustained in favor of a woman aged thirty-eight, of previous good health, who had been earning $75 a month, but was wholly incapacitated from following her vocation, the injuries consisting of a permanent displacement of the womb and the breaking of an ankle bone, which would probably require the amputation of the injured leg. Smith v. Spokane, 16 Wash. 403, 47 Pac. Rep. 888.

When injured the plaintiff, aged

damages was practically unlimited by any other rule." The instructions should direct the jury to allow only such damages as the plaintiff had shown to have been sustained.[1] Because pain is not measurable in money, though it is a circumstance

thirty, was strong and healthy, and was making $50 a month in addition to discharging her household duties. She permanently lost the use of her lower limbs by reason of paralysis resulting from a concussion of the spinal cord. A verdict for $15,000 was sustained. Sears v. Seattle Consolidated R. Co., 6 Wash. 227, 33 Pac. Rep. 389. See Sutton v. Snohomish, 11 Wash. 24, 39 Pac. Rep. 273.

The injuries to a girl of eight comprised damage to one eye, the loss of part of the bones of the face and skull, a portion of the gray matter of the brain and the exposure of some of that remaining except as it was protected by a scar tissue which grew over it. A verdict for $30,000 was set aside, and, in view of the fact that two juries had fixed the damages at $12,000, judgment for that sum was given, though it was deemed large. Mitchell v. Tacoma R. & M. Co., 13 Wash. 560, 43 Pac. Rep. 528.

A verdict for $4,000 in favor of a laborer who lost a little finger and had the one next it broken, the hand being weak and stiff a year after the injury, was reduced to $3,000. Mayhood v. Pleasant Valley Coal Co., 8 Utah, 85, 30 Pac. Rep. 149.

A girl of three years retained a judgment for $10,500 for the loss of a foot, the defendant being grossly negligent, though punitive damages were not claimed. Chipman v. Union Pacific R. Co., 12 Utah, 68, 41 Pac. Rep. 562.

When injured so as to be obliged to have one of his feet amputated the plaintiff was aged thirty-seven, and was earning from $1,800 to $2,400 a year. A verdict for $15,000 was allowed to stand. Galveston, etc. R. Co. v. Scott, 21 Tex. Civ. App. 24, 50 S. W. Rep. 477.

A verdict for $18,000 for the loss of a leg and a permanent injury to the other foot was not excessive, the plaintiff being aged forty-one, and his wages $45 a month. Galveston, etc. R. Co. v. Hynes, 21 Tex. Civ. App. 34, 50 S. W. Rep. 624.

The recovery of $7,500 by a railroad conductor, aged forty, whose wages were $90 a month, for the loss of a leg was not excessive. Thompson v. Great Northern R. Co., 79 Minn. 291, 82 N. W. Rep. 637.

The loss of a foot by a boy of eighteen, who was earning $60 a month, justified an award of $8,000. San Antonio, etc. R. Co. v. Green, 20 Tex. Civ. App. 5, 49 S. W. Rep. 670.

A man of twenty-eight, earning from $80 to $95 a month, had his skull crushed and a portion of it removed, leaving the brain unprotected except by the skin, and his left eye destroyed. At the time of the trial he was unable to labor. A verdict for $10,000 was sustained. Missouri, etc. R. Co. v. Parker, 20 Tex. Civ. App. 470, 49 S. W. Rep. 717.

The plaintiff, a woman of seventy-five, and before the accident in somewhat feeble health, met with an injury which resulted in the

[1] Freeman Wire & Iron Co. v. Collins, 53 Ill. App. 29; Illinois Central R. Co. v. Creighton, id. 45; Same v. Farrell, 86 id. 436; Cleveland, etc. R. Co. v. Jenkins, 174 Ill. 398, 51 N. E. Rep. 811, 66 Am. St. 296; Gilbertson v. Forty-second Street, etc. R. Co., 14 App. Div. 294, 43 N. Y. Supp. 783; Quincy Horse R. & C. Co. v. Schulte, 71 Fed. Rep. 487, 18 C. C. A. 211.

to be taken into account in fixing the sum due an injured plaintiff, an instruction that leaves the jury to regard it as an independent item of damages to be compensated by a sum of money that may be regarded as a pecuniary equivalent

fracture of one of the bones on the outer side of an ankle, the tearing of the lateral ligaments of the ankle, and injury to the joint. The suffering was great, the disability permanent, as also the pain. In view of her expectation of life, a judgment for $4,000 was reduced to $2,500. Johnson v. St. Paul City R. Co., 67 Minn. 260, 69 N. W. Rep. 900, 36 L. R. A. 586.

Where the immediate injury, a wound on the knee, caused a nervous shock which resulted in the development of heart disease and a nervous disorder, both of which were probably permanent and rendered the plaintiff, a previously healthy, active woman, a helpless invalid, a judgment for $10,000 was affirmed. Galloway v. Chicago, etc. R. Co., 56 Minn. 346, 57 N. W. Rep. 1058, 45 Am. St. 468, 23 L. R. A. 442.

The loss by a boy of both feet was not over-compensated by a judgment for $30,000. Retan v. Lake Shore, etc. R. Co., 94 Mich. 146, 53 N. W. Rep. 1094.

A verdict for $17,500 in favor of a woman of thirty-five who was, previous to her injury, in good health and able to attend to all her household duties, was regarded as excessive for a partial disability, though much suffering had been endured. Some stress was laid upon the fact that the plaintiff had not been earning money, and had no qualification for doing so, so far as the evidence disclosed. Louisville & N. R. Co. v. Creighton, 20 Ky. L. Rep. 1691, 50 S. W. Rep. 227.

A verdict for $10,000 in favor of an infant of six for an injury necessitating the amputation of a leg above the knee was not considered unusual in Louisville & N. R. Co. v. Popp, 96 Ky. 99, 112, 27 N. W. Rep. 992.

In Kroener v. Chicago, etc. R. Co., 88 Iowa, 16, 55 N. W. Rep. 28, a verdict in favor of a youth of twenty for $12,000 for the loss of a foot was reduced one-third.

The sum of $14,000 in favor of a woman of thirty-five, whose previous health had been good, who suffered greatly and who must continue to suffer or submit to a surgical operation by which the injured organs may be removed, which operation might imperil her life, is not excessive. Illinois Central R. Co. v. Cheek, 152 Ind. 663, 678, 53 N. E. Rep. 641.

Notwithstanding a car driver, who was so thoroughly disabled physically that he could only walk on crutches, and suffered great pain four years after the injury was inflicted, possessed the qualifications and acquirements whereby he could earn, temporarily at least, more in a clerkship than he was receiving when injured, a verdict for $15,000 was not interfered with. Chicago City R. Co. v. Taylor, 68 Ill. App. 613.

Where a man of forty-five, in good health and vigor and with average prospects, and whose earnings had been from $80 to $90 a month, had his capacity for every kind of employment seriously and permanently impaired, a judgment for $16,500 was affirmed. Chicago City R. Co. v. Leach, 80 Ill. App. 354. See North Chicago Street R. Co. v. Dudgeon, 83 id. 528. In another case, not very dissimilar, a verdict for $11,000 was sustained. Chicago v. Gillett, 91 Ill. App. 287.

When injured the plaintiff was

is erroneous. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for, or made because of, the suffering con-

earning $12 a week; he was confined in a hospital for one year. His permanent injuries consisted of an enlargement of the calf of the right leg and varicose veins, which prevented his doing hard or heavy work. A verdict for $15,000 was reduced to $8,000. Chapman v. Atlantic Avenue R. Co., 14 N. Y. Misc. 384, 35 N. Y. Supp. 1045.

Where a well man of forty-six, who was earning $1,500 a year, had a foot and ankle broken and crushed and underwent an amputation below the knee, a verdict for $15,000 was sustained. Galveston, etc. R. Co. v. Cooper, 2 Tex. Civ. App. 42, 20 S. W. Rep. 990.

A verdict for $22,500 in favor of a boy aged eleven, who underwent two amputations which removed the portion of a leg from below the knee, was sustained by a majority of the court. Williamson v. Brooklyn Heights R. Co., 53 App. Div. 399, 65 N. Y. Supp. 1054.

Where a healthy and robust married woman in the prime of life had one leg amputated below the knee, the stump of which did not completely heal, suffered from an enlargement of an arm which interfered with its use, and had her hearing impaired, a verdict for $23,000 was upheld. Erickson v. Brooklyn Heights R. Co., 11 N. Y. Misc. 662, 32 N. Y. Supp. 915.

A woman of twenty-four, permanently injured in her spine and limbs, who was confined to her bed the greater part of a year, and whose nervous system was greatly disturbed, was not over-compensated by $11,500. Savage v. Joseph H. Bauland Co., 42 App. Div. 285, 58 N. Y. Supp. 1014. See Kraemer v. Metropolitan Street R. Co., 51 App. Div. 475, 64 N. Y. Supp. 619.

Where the injuries to a girl of five resulted in chronic cystitis and concussion of the spine, and it was reasonably certain that the spinal trouble would be permanent, and she was suffering from nervous shock and hysteria, a judgment for $10,000, the full sum sued for, was affirmed. McTague v. Dowst, 51 App. Div. 206, 64 N. Y. Supp. 949.

A verdict for $25,000 in favor of an oiler of machinery for the loss of his right arm half way between the hand and the elbow was, after being reduced by the trial court to $15,000, further reduced to $10,000. O'Donnell v. American Sugar Refining Co., 41 App. Div. 307, 58 N. Y. Supp. 640. See Missouri, etc. R. Co. v. Kirkland, 11 Tex. Civ. App. 528, 32 S. W. Rep. 588.

The reviewing court refused to set aside a verdict for $15,000 for the loss of one of the legs of a child above the knee, the trial court having refused to interfere. Kalfur v. Broadway Ferry, etc., 34 App. Div. 267, 54 N. Y. Supp. 503.

A verdict for $8,000 in favor of a truckman of twenty-five years for the loss of the use of his right arm was regarded as large, but not excessive, though he earned as much as a bookkeeper after the injury as he had earned before. O'Keefe v. Eighth Avenue R. Co., 33 App. Div. 324, 53 N. Y. Supp. 940.

A verdict for $8,500 was sustained where a child became practically an idiot in consequence of an injury. Wehnyk v. Second Avenue R. Co., 14 App. Div. 515, 43 N. Y. Supp. 1023.

sequent upon the injury.[1] Probably because exceptions to the instructions are examined in the light of the verdict, there is not unanimity among the authorities as to the particularity with which the court must charge the jury in these matters.

An award of $25,000 to a man of twenty-eight, whose earnings were about $12 a week, for the loss of a leg was reduced to $15,000. Tully v. New York & T. Steamship Co., 10 App. Div. 463, 42 N. Y. Supp. 29. One of $12,500 in favor of a cab driver aged thirty-two, who was earning $12 a week and who suffered a compound fracture of the jaw and a comminuted fracture of both legs, though considered large, was not disturbed. McDonnel v. Henry Elias Brewing Co., 16 App. Div. 223, 44 N. Y. Supp. 652.

When injured the plaintiff was twenty-eight, and was earning $3,600 a year and expenses. His right arm and five ribs were broken, and he had serious cuts upon a leg, bruises and wounds in the back, some of the large muscles being torn from their attachments to the spine. His ultimate recovery was placed at periods of from two to five years. A verdict for $25,000 was sustained, with an intimation that the result would have been the same if the trial court had not reduced it by $10,000. Diffenbach v. New York, etc. R. Co., 5 App. Div. 91, 38 N. Y. Supp. 788.

In De Wardener v. Metropolitan Street R. Co., 1 App. Div. 240, 37 N. Y. Supp. 123, a left arm was permanently crippled; a difficult and painful surgical operation had been undergone, and the plaintiff's nerves had become affected. No loss of earnings was shown, nor was the permanency of his nervous condition established. A verdict for $25,000 was reduced to $15,000 and the amount of the bill for surgical and medical attention.

Where a brakeman, who earned $1.60 per day, was injured so that his leg was amputated below the knee, and had his right arm, one of his lips and one of his legs cut, and a knee joint stiffened, a verdict for $16,000 was reduced to $9,000. Two previous trials had resulted in verdicts for $8,000 and $10,000 respectively. Before the third trial the plaintiff had become able to earn something, but how much did not appear. Bailey v. Rome, etc. R. Co., 80 Hun, 4, 29 N. Y. Supp. 816.

A woman of twenty-seven, who was severely and permanently injured, and who had expended $1,000 for medical services, retained a verdict for $15,000. Mitchell v. Broadway & Seventh Avenue R. Co., 70 Hun, 387, 24 N. Y. Supp. 32.

The sum of $11,400 was not considered excessive where a healthy man of twenty-seven became a physical wreck from a compound fracture of the skull, which affected the brain and one eye, probably necessitating the removal of the latter. Cobb v. St. Louis & H. R. Co., 149 Mo. 609, 50 S. W. Rep. 894.

A verdict for $6,500 in favor of a switchman of twenty-six, whose wages were $60 a month, for the loss of his right arm, was approved in Illinois Central R. Co. v. Price, 72 Miss. 862, 18 So. Rep. 415. In Rodney

[1] Per Williams, J., in Goodhart v. Pennsylvania R. Co., 177 Pa. 1, 15, 35 Atl. Rep. 191, 55 Am. St. 705; Ritchie v. Victorian Railways Commissioner, 25 Vict. L. R. 272; Deep Mining & Drainage Co. v. Fitzgerald, 21 Colo. 533, 43 Pac. Rep. 210.

In Alabama it is laid down that if the case is one in which punitive damages may be allowed and the elements of physical and mental pain and suffering enter into it, there is no error in saying to the jury that if the plaintiff is entitled to recover

v. St. Louis Southwestern R. Co., 127 Mo. 676, 28 S. W. Rep. 887, a verdict in favor of a switch foreman aged twenty-eight, and earning $100 a month, for $12,500 for the loss of an arm, was sustained.

Where a leg of a man of thirty-two, who was earning $65 a month, was crushed below the knee, and three amputations were necessary (the last being above the knee), a judgment for $10,000 was upheld. Hollenbeck v. Missouri Pacific R. Co., 141 Mo. 97, 112, 38 S. W. Rep. 723. See Houston & T. C. R. Co. v. Kelley, 13 Tex. Civ. App. 1, 34 S. W. Rep. 809. In Wimber v. Iowa Central R. Co., 114 Iowa, 551, 87 N. W. Rep. 505, a judgment for $14,500 in favor of a brakeman, aged thirty-six, who lost a leg below the knee, was reduced to $8,000.

Where a railroad section hand was so injured that he suffered from almost complete motor and sensory paralysis of the left side, and the effect of the injury was apparently permanent, a judgment for $10,000 was affirmed. Foster v. Missouri Pacific R. Co., 115 Mo. 165, 21 S. W. Rep. 916. See Gratiot v. Same, 116 Mo. 450, 21 S. W. Rep. 1094, 16 L. R. A. 189.

A verdict for $5,000 for the loss of two fingers has been condemned. Louisville & N. R. Co. v. Foley, 94 Ky. 220, 21 S. W. Rep. 866. As has one for $2,000 for an injury necessitating the amputation of a thumb at the first joint. Same v. Law, 14 Ky. L. Rep. 850, 21 S. W. Rep. 648. Where a boy of nine had the ends of the ring and middle fingers of his left hand mangled so as to require their amputation at or near the first joint, a judgment for $1,800 was reduced to $1,200. Gahagan v. Aermotor Co., 67 Minn. 252, 69 N. W. Rep. 914. A man of twenty lost the index finger of his left hand, and had the first and second joints of the second finger thereof permanently injured, and also sustained such injury to the joints of the thumb as affected its use. The trial court reduced a verdict for $4,500 to $3,500, and the higher court reduced the latter sum to $2,500 and interest from the date of the trial. Stiller v. Bohn Manuf. Co., 80 Minn. 1, 82 N. W. Rep. 981.

Damages where injuries temporary. Where a young woman sustained injuries which resulted in broken ribs and injured spine, and was under medical treatment for many weeks, though not confined to her room, and suffered at intervals of about six weeks pains resembling those of child-birth, which continued to the time of the trial, $6,933 was not excessive. Houston, etc. R. Co. v. Lee, 69 Tex. 556, 7 S. W. Rep. 324.

An injury to a knee-cap, resulting in the loss of three or four weeks' time and a good deal of pain, was more than compensated for by $4,000, it appearing probable that there would be a recovery. Chicago v. Colman, 33 Ill. App. 557.

An award of $4,500 for the fracture of an arm, the only proof of permanent injury being the testimony of the plaintiff and a fellow-workman to the effect that the former could not do the work of an able-bodied laborer, was set aside. There was no evidence of decreased earnings. Chicago, etc. R. Co. v. Hughes, 87 Ill. 94. See Chicago, etc. R. Co. v. Avery, 10 Ill. App. 210.

they may award him such sum as they see proper, not in excess of that sued for.[1] In a Georgia case in which the only ground of recovery was for injury to the peace, happiness and feelings of the plaintiff, no harm was done the defendant by saying to

For the fracture of a lady's leg in two places and the dislocation of her ankle, resulting in confinement to her room for four and the use of crutches for eight months, and from the effects of which she had not recovered at the time of the trial, $6,000 was held not excessive. Peniston v. Chicago, etc. R. Co., 34 La. Ann. 777, 44 Am. Rep. 444.

A verdict for $800 was sustained for the impaling of a man's hand upon a point of a railing in consequence of a fall. Bushnell v. Metz, 18 Ill. App. 84.

A man aged fifty-two years, earning $540 per year, was so injured as to cause a "knot" on his head of the size of a hen's egg, and afterwards was troubled with slight attacks of vomiting, pain in his head and dizziness; there was some evidence to the effect that injury to the hearing was probable. A verdict for $2,500 was reduced to $1,250. Yates v. Southwestern Brush, etc. Co., 40 La. Ann. 467, 4 So. Rep. 250.

Where the plaintiff was seriously injured, suffered great pain, was exposed to loss of time and business and large expenses, but improved rapidly under medical treatment, was able for months before the trial to attend to his business and to earn his livelihood, and there was strong evidence that he would be completely cured, a verdict for $25,000 was set aside, and judgment for $5,000 rendered. Peyton v. Texas & P. R. Co., 41 La. Ann. 861, 6 So. Rep. 690, 17 Am. St. 430.

A girl aged nine was set upon by a dog, thrown down and bitten so that a wound nearly two inches in length and half an inch in depth was inflicted upon her hip; she was confined to bed for several weeks, and was lame at the time of the trial. A verdict for $1,450 (which was to be doubled pursuant to a statute) was affirmed. Fitzgerald v. Dobson, 78 Me. 559, 7 Atl. Rep. 704.

Where the injury to a man of twenty-five years was a concussion of the spinal cord, resulting in an abnormal condition of the nervous system which affected his health and rendered him unfit to follow the avocation of a railroad engineer, but he had so far recovered as to engage in business and be able to devote most of his time to it, and the evidence was conflicting as to the probability of an ultimate recovery, a verdict for $6,250 was reduced to $3,000. Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. Rep. 860.

One of plaintiff's eyes was injured by glass being thrown into it; he was confined to his house five weeks and suffered pain. He was able to work for the twenty months intervening between his recovery and the trial, and the condition of the eye, though it was permanently weakened, did not become worse. In the absence of proof showing to a reasonable certainty that his condition would grow worse, a verdict for $9,000 was reduced to $4,000. Jewell v. Union Passenger R. Co., 16 Phila. 64.

Where the injury resulted in a miscarriage and other suffering a

[1] Alabama, etc. R. Co. v. Burgess, 119 Ala. 555, 564, 25 So. Rep. 251, 72 Am. St. 943.

the jury that the damages were left to their enlightened consciences.[1] It is important that the court exercise discretion in its remarks to the jury and avoid everything that looks toward an undue increase of the award. It has been held error to say

verdict for $2,000 was sustained. Joliet v. Conway, 17 Ill. App. 577.

A man of sixty-seven retained a judgment for $5,000 for a broken leg. North Chicago Street R. Co. v. Wiswell, 68 Ill. App. 443.

A wanton injury to a child of eight whereby the outer plate of the skull was fractured, inflicting a temporary loss of speech and unconsciousness for two days, was overcompensated by $5,000, the only permanent injury being a slight depression in that plate. Alabama, etc. R. Co. v. Burgess, 119 Ala. 555, 25 So. Rep. 251, 72 Am. St. 943.

Where the plaintiff's earning capacity was not impaired by the injury a verdict for $2,500 for injuries which confined him to bed for two months and to the house for four months was reduced to $2,000, notwithstanding all the effects of the injury had not disappeared. West Chicago Street R. Co. v. Musa, 80 Ill. App. 223.

A verdict for $1,500 in favor of a woman of fifty-nine whose face was badly bruised, and one of whose eyes was badly discolored and swollen nearly shut for five weeks was set aside, there having been no expense for medical attendance, and the apparent effects of the bruise having passed away in two months. Dixon v. Scott, 74 Ill. App. 277.

The only evidence of injury being that the plaintiff sustained a shock, a sprained wrist, discolorations on one of the limbs, back and sides, and the resulting pain, a verdict for $2,500 was deemed excessive. Lake Street Elevated R. Co. v. Johnson, 70 Ill. App. 413.

A verdict in favor of a woman whose collar bone was dislocated and pushed forward, for $5,000, after being reduced one-half by the trial court, was sustained. Calumet Electric Street R. Co. v. Jennings, 83 Ill. App. 616.

The Kentucky superior court refused to interfere with a verdict for $2,750 in favor of a lady who was publicly assaulted by a youth of seventeen, the assault being accompanied by opprobious epithets, though but slight bodily harm resulted. Vindictive damages were included. Crosby v. Bradley, 11 Ky. L. Rep. 954.

A verdict for $1,400 was retained for the fracture of one of the bones of the leg above the ankle, the plaintiff having been confined to his house for more than two months, and incurred liability for $75 for medical aid. Smith v. Des Moines, 84 Iowa, 685, 51 N. W. Rep. 77.

Though punitive damages were recoverable, a verdict for $26,000 for serious external cuts and bruises and a shock which greatly affected the plaintiff's nervous system was set aside. Louisville & N. R. Co. v. Long, 94 Ky. 410, 22 S. W. Rep. 747. In Louisville Southern R. Co. v. Minogue, 12 Ky. L. Rep. 378, 90 Ky. 369, 14 S. W. Rep. 357, 29 Am. St. 378, a verdict for $10,000 was set aside, the injury being a shock caused by the running of a train into the rear of a passenger coach.

A verdict for $4,100 in favor of a man aged thirty, who was earning $35 a month, for the transverse fracture of a thigh bone, whose recovery had been satisfactory, though

[1] Georgia R. & B. Co. v. Jett, 95 Ga. 236, 22 S. E. Rep. 251.

that "no sane man would lose a leg for any compensation, but you are not to be guided by such a consideration as that in arriving at the amount of damages;"[1] and to instruct that damages may be given to the extent of the sum claimed, that being emphasized by the statement that, if any are given, they should be given to the full.[2]

his leg was shortened about three-fourths of an inch, was reduced to $2.100. Slette v. Great Northern R. Co., 53 Minn. 341, 55 N. W. Rep. 137.

Where a laundryman sustained a badly bruised foot, no bones being broken, which prevented him from walking on it, and obliged him to use crutches for six or eight weeks, and which was quite painful at the time of the trial, and which might render the ankle permanently weak, but which left him able to follow his usual occupation, a verdict for $3,000 was reduced to $2,000. Kennedy v. St. Paul City R. Co., 59 Minn. 45, 60 N. W. Rep. 810.

Where internal organs were displaced as the result of being thrown from a car and sustaining a severe shock, and the nervous trouble and other difficulties were probably curable, a verdict for $20,000 was reduced to $7,500. Hamilton v. Great Falls Street R. Co., 17 Mont. 334, 42 Pac. Rep. 860.

The plaintiff, a school teacher of fifty-four, whose salary was $1,750 a year, was confined to bed for two weeks, suffered and continued to suffer to some extent from congestion of the brain, and was unable to perform her duties for four months, and, after that time, with less than her usual vigor. The pecuniary loss was small, and no medical expense was shown to have been incurred. A verdict for $10,000 was reduced one-half. Smith v. Third Avenue R. Co., 10 App. Div. 409, 41 N. Y. Supp. 977. See Becker v. Albany R. Co., 35 App. Div. 46, 54 N. Y. Supp. 395.

A judgment for $4,250 in favor of a woman of seventy-two for the breaking of a lower limb and bruising her body was reversed because excessive. Cherokee Packet Co. v. Hilson, 95 Tenn. 1, 31 S. W. Rep. 737.

Where a woman was injured by the infliction by a savage dog of a wound on her wrist, penetrating to the bone, and one in her side three-fourths of an inch long and one-fourth of an inch deep, and was rendered so nervous that she could scarcely sleep and was threatened with convulsions, a verdict for $800 was sustained. Robinson v. Marino, 3 Wash. 434, 441, 28 Pac. Rep. 752, 28 Am. St. 50.

A simple fracture of the fibula of a child of thirteen which reunited under the usual treatment so as to show a complete recovery was overcompensated by $1,700, to which sum it was reduced by the trial court, the verdict being for $2,500. Collins v. Janesville, 107 Wis. 436, 83 N. W. Rep. 695.

A verdict for $2,000 for a broken arm was approved in New Orleans & C. R. Co. v. Schneider, 60 Fed. Rep. 210, 8 C. C. A. 571.

And one for $500 in favor of a person who was assaulted by being seized by the collar at the throat and threatened with the fist, nervous prostration resulting. Sabre v. Mott, 88 Fed. Rep. 780.

[1] Dooner v. Delaware & H. Canal Co., 164 Pa. 17, 34, 30 Atl. Rep. 269.

[2] Rost v. Brooklyn Heights R. Co., 10 App. Div. 477, 41 N. Y. Supp. 1069.

§ 1257. False imprisonment. The injury done by being illegally restrained of one's liberty is akin to that suffered from [732] assault and battery.[1] The injured party in such cases, even though the act complained of be done without malice, is entitled to recover the expenses reasonably incurred to procure discharge from the restraint, for loss of time, interruption of his business, and the suffering, bodily and mental, which the wrong may have occasioned.[2] The right to recover the money paid to obtain release from restraint under an illegal tax warrant is not affected by the validity of the tax.[3] But interest on it is not recoverable as matter of law; its allowance as damages, and not strictly as interest, is within the discretion of the jury.[4] A married woman cannot recover expenses paid by her husband in consequence of her false imprisonment; he must

[1] Cooley on Torts, 169; Comer v. Knowles, 19 Kan. 440, 441.

[2] Parsons v. Harper, 16 Gratt. 64; Fenelon v. Butts, 53 Wis. 344, 10 N. W. Rep. 501; Butler v. Stockdale, 19 Pa. Super. Ct. 98; Harness v. Steele, 159 Ind. 286, 64 N. E. Rep. 875; Young v. Gormley, — Iowa, —, 94 N. W. Rep. 922; Petit v. Colmary, 55 Atl. Rep. 344 (Del.); Stewart v. Maddox, 63 Ind. 51; Jay v. Almy, 1 Woodb. & M. 262; Bonesteel v. Bonesteel, 30 Wis. 511; Blythe v. Tompkins. 2 Abb. Pr. 468; Abrahams v. Cooper, 81 Pa. 232; Ocean Steamship Co. v. Williams, 69 Ga. 251; Blanchard v. Burbank, 16 Ill. App. 375; Wheeler & W. Manuf. Co. v. Boyce, 36 Kan. 350, 13 Pac. Rep. 609, 59 Am. Rep. 571; Wentz v. Bernhardt, 37 La. Ann. 636; Ross v. Leggett, 61 Mich. 445, 28 N. W. Rep. 695, 1 Am. St. 608; Rown v. Christopher, etc. R. Co., 34 Hun, 471; Hays v. Creary, 60 Tex. 445; Ogg v. Murdock, 25 W. Va. 139; Clarke v. American Dock & I. Co., 35 Fed. Rep. 478; Kilbourn v. Thompson, MacArthur & M. (D. C.) 401; Hewlett v. George, 68 Miss. 703, 9 So. Rep. 885; Mexican Central R. Co. v. Gehr, 66 Ill. App. 173; State v. Evans, 83 Mo. App. 301, 307, quoting the text; Duggan v. Baltimore & O. R. Co., 159 Pa. 248, 28 Atl. Rep. 182, 39 Am. St. 672; Vanderberg v. Connoly, 18 Utah, 112, 125, 54 Pac. Rep. 1097; Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. Rep. 191; Coffin v. Varila, 8 Tex. Civ. App. 417, 27 S. W. Rep. 956.

Newspaper accounts of the arrest and commitment of the plaintiff may be received as evidence on the question of damages, no comment being published in connection with the accounts. Scott v. Flowers, 60 Neb. 675, 689, 84 N. W. Rep. 81; Newburn v. Durham, 10 Tex. Civ. App. 655, 32 S. W. Rep. 112; Karner v. Stump, 12 Tex. Civ. App. 460, 34 S. W. Rep. 656; Bolton v. Vellines, 94 Va. 393, 26 S. E. Rep. 847, 64 Am. St. 737. In opposition, though the accounts were received merely to show the extent of the mental suffering, is Butler v. Stockdale, 19 Pa. Super. Ct. 98.

[3] Clark v. Woods, 17 L. J. (Mag. Cas.) 189; Morton v. Monckton, 11 T. L. Rep. 242.

[4] Taylor v. Coolidge, 64 Vt. 506, 24 Atl. Rep. 656.

bring an independent action therefor.[1] The filthy condition of the jail in which the plaintiff was confined or any other discomfort or deprivation may be shown to enhance compensatory damages for mental anguish and discomfort;[2] but not wrongful acts done by an officer if they were not authorized by the defendant.[3] One who makes an arrest without process and turns the person arrested over to a jailer, after keeping watch of him a few hours, is not liable for any damages sustained by such person after his subsequent arrest on process, the defendant not having anything to do with the latter arrest.[4] If the arrest is made after the suit has been begun the expense of defending the latter cannot be recovered.[5] The plaintiff may recover for loss of work, not only up to the time of the suit, but also for the time lost thereafter if by the arrest he failed to get the work he otherwise would have obtained.[6] But the loss of employment for nine months in consequence of the failure of a person imprisoned for one night to keep an appointment in the morning after his discharge is not the proximate consequence of such imprisonment.[7] Where the master of a vessel unjustifiably imprisoned a seaman until his effects on board were lost or sold it was held that the damages should not be vindictive unless the motives of the master were bad; but compensation should usually be made for the time of the imprisonment, the value of the articles lost or sold, and interest on the amount, and the cost of passage home.[8] There cannot be a recovery for a loss resulting from sickness which is experienced after the imprisonment has ceased unless the petition sets forth the fact of the sickness or facts from which

[1] Burnham v. Webster, 54 N. Y. Super. Ct. 30.

[2] Fenelon v. Butts, 53 Wis. 344, 10 N. W. Rep. 501; Miller v. Fano, 134 Cal. 103, 66 Pac. Rep. 183, citing the text; Jacques v. Parks, 96 Me. 268, 52 Atl. Rep. 763; Petit v. Colmary, 55 Atl. Rep. 344 (Del.); Mexican Central R. Co. v. Gehr, 66 Ill. App. 173; San Antonio, etc. R. Co. v. Griffin, 20 Tex. Civ. App. 91, 48 S. W. Rep. 542; Kindred v. Stitt, 51 Ill. 401; Abrahams v. Cooper, 81 Pa. 232; Clarke v. American Dock & I. Co., 35 Fed. Rep. 478.

[3] Ocean Steamship Co. v. Williams, 69 Ga. 251.

[4] Wyatt v. Hill, 71 Vt. 468, 45 Atl. Rep. 1044; Southwick v. Hare, 24 Ont. 528.

[5] Gibbs v. Randlett, 58 N. H. 407.

[6] Thompson v. Ellsworth, 39 Mich. 719.

[7] Carpenter v. Pennsylvania R. Co., 13 App. Div. 328, 43 N. Y. Supp. 203.

[8] Jay v. Almy, 1 Woodb. & M. 262.

it may be inferred, or from which the law will imply, that it would necessarily follow from the facts alleged.[1] If one is simultaneously arrested on two warrants, one of which is invalid, he sustains no additional injury for that reason except as to the money paid to be released from the detention under the void warrant.[2] If special damages are not pleaded and punitive damages are not recoverable, injury to the plaintiff's reputation is not an element of his damage.[3] The arrest being unlawful, it is not necessary to prove malice;[4] and probable cause is only material in mitigation of damages.[5] A declaration which alleges that the imprisonment was by means of threats and violence, without any reasonable cause and unlawful, states the ingredients of malice, and is broad enough to support a charge on that basis.[6] And in such cases, when there is no possible way of measuring damages with any certainty, the sound discretion of the jury under all the circumstances is the only measure practicable.[7] The trial court may,

[1] Atchison, etc. R. Co. v. Rice, 36 Kan. 593, 14 Pac. Rep. 229.

[2] Allison v. Hobbs, 96 Me. 26, 51 Atl. Rep. 245; Doherty v. Munson, 127 Mass. 495.

[3] Bergeron v. Peyton, 106 Wis. 377, 382, 82 N. W. Rep. 291.

[4] Wentz v. Bernhardt, 37 La. Ann. 636; Gross v. Rice, 71 Me. 241; Chismon v. Carney, 33 Ark. 316; Painter v. Ives, 4 Neb. 122; Hight v. Naylor, 86 Ill. App. 508; Reynolds v. Price, 22 Ky. L. Rep. 5, 56 S. W. Rep. 502; Palmer v. Maine Central R. Co., 92 Me. 399, 42 Atl. Rep. 800, 69 Am. St. 513, 44 L. R. A. 673; Linnen v. Banfield, 114 Mich. 93, 72 N. W. Rep. 1; Monson v. Rouse, 86 Mo. App. 97; Johnson v. Bouton, 35 Neb. 898, 53 N. W. Rep. 995; Hewitt v. Newburger, 66 Hun, 230, 20 N. Y. Supp. 913.

[5] Norman v. Manciette, 1 Sawyer, 484; Sleight v. Ogle, 4 E. D. Smith, 445; Brown v. Chadsey, 39 Barb. 253; Bacon v. Bacon, 76 Miss. 458, 471, 24 So. Rep. 968; Bergeron v. Peyton, 106 Wis. 377, 381, 82 N. W. Rep. 291, citing the text; Garnier v. Squires, 62 Kan. 321, 62 Pac. Rep. 1005; Wells v. Johnston, 52 La. Ann. 713, 27 So. Rep. 185; Gambrill v. Schmuck, 131 Ala. 321, 31 So. Rep. 604.

[6] Brushaber v. Stegemann, 22 Mich. 266, 270.

[7] Id. See Young v. Gormley, —— Iowa, ——, 94 N. W. Rep. 922; Josselyn v. McAllister, 22 Mich. 300; Farman v. Lauman, 73 Ind. 568; Harris v. Louisville, etc. R. Co., 35 Fed. Rep. 116; Bacon v. Bacon, 76 Miss. 458, 472, 24 So. Rep. 968; Scott v. Flowers, 60 Neb. 675, 690, 84 N. W. Rep. 81; Pastor v. Regan, 9 N. Y. Misc. 547, 551, 30 N. Y. Supp. 657; Coffin v. Varila, 8 Tex. Civ. App. 417, 27 S. W. Rep. 956; Bolton v. Vellines, 94 Va. 393, 26 S. E. Rep. 847, 64 Am. St. 737; Bergeron v. Peyton, 106 Wis. 377, 382, 82 N. W. Rep. 291; Pinkerton v. Sydnor, 87 Ill. App. 76; McKelvey v. Marsh, 63 App. Div. 396, 71 N. Y. Supp. 541; Mexican Central R. Co. v. Gehr, 66 Ill. App. 173; Atchison, etc. R. Co. v. Henry, 55 Kan. 715, 41 Pac. Rep. 952, 29 L. R. A. 465; Wegner v. Risch, 114 Wis. 270, 90 N. W. Rep.

of course, grant a new trial on the ground of excessiveness of the damages, and its discretion in so doing will not be reversed unless it has been abused.[1] The appellate court will, in a proper case, require the remitter of such sum as it thinks excessive or grant a new trial.[2]

§ 1258. Same subject. If the defendant has acted wantonly, oppressively or maliciously in causing the arrest [733] he may, in the discretion of the jury, be liable for exemplary damages;[3] but not otherwise.[4] The reputed wealth of the de-

168 (verdict for a nominal sum); Alau v. Everett, 7 Hawaiia, 82; Efroymson v. Smith, 29 Ind. App. 451, 63 N. E. Rep. 328.

[1] Miller v. Ashcraft, 98 Ky. 314, 32 S. W. Rep. 1085.

[2] Palmer v. Maine Central R. Co., 92 Me. 399, 42 Atl. Rep. 800, 69 Am. St. 513, 44 L. R. A. 673; Yost v. Tracy, 13 Utah, 431, 45 Pac. Rep. 346; Bailey v. Hart, 9 Vict. L. R. (law) 66; Rapken v. Adams, 23 id. 187; Fanjoy v. Portland, 29 N. B. 24.

In the following cases excessive verdicts were set aside: Woodward v. Glidden, 33 Minn. 108, 22 N. W. Rep. 127; Schneider v. McGill, 23 Ky. L. Rep. 585, 64 S. W. Rep. 835; Dodge v. Alger, 53 N. Y. Super. Ct. 107; Fotheringham v. Adams Exp. Co., 36 Fed. Rep. 252; Brown v. Chadsey, 39 Barb. 253; Reuck v. McGregor, 32 N. J. L. 70; McConnell v. Hampton, 12 Johns. 234; Kilbourn v. Thompson, MacArthur & M. (D. C.) 401.

Where the arrest was justifiable, but the detention of the prisoner continued for an unreasonable length of time, and he was handcuffed and carried out of the county without a warrant, it was held erroneous to instruct that nominal damages were legally possible. Potter v. Swindle, 77 Ga. 419. Very moderate damages were assessed by the court in Jacques v. Parks, 96 Me. 268, 52 Atl. Rep. 763.

[3] Ross v. Leggett, 61 Mich. 445, 28 N. W. Rep. 695, 1 Am. St. 608; Gambrill v. Schmuck, 131 Ala. 321, 31 So. Rep. 604; Tucker v. Winders, 130 N. C. 147, 41 S. E. Rep. 8; Woodward v. Glidden, 33 Minn. 108, 22 N. W. Rep. 127; Grace v. Dempsey, 75 Wis. 313, 43 N. W. Rep. 1127; Parsons v. Harper, 16 Gratt. 64; Parsons v. Lloyd, 3 Wils. 341, 2 W. Bl. 845; Turner v. Telgate, 1 Lev. 95; Barker v. Braham, 3 Wils. 368; Codrington v. Lloyd, 8 Ad. & E. 449; Curry v. Pringle, 11 Johns. 444; Gold v. Bissell, 1 Wend. 210; Fellows v. Goodman, 49 Mo. 62; Warwick v. Foulkes, 12 M. & W. 507; Josselyn v. McAllister, 22 Mich. 300; Thorpe v. Wray, 68 Ga. 359; Atchison, etc. R. Co. v. Henry, 55 Kan. 715, 41 Pac. Rep. 952, 29 L. R. A. 465; San Antonio, etc. R. Co. v. Griffin, 20 Tex. Civ. App. 91, 48 S. W. Rep. 542; Roza v. Smith, 65 Fed. Rep. 592; Boyle v. Case, 18 Fed. Rep. 880; Pinkerton v. Sydnor, 87 Ill. App. 76; Stevens v. O'Neill, 51 App. Div. 364, 64 N. Y. Supp. 663, affirmed, 169 N. Y. 375, 62 N. E. Rep. 424; Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. Rep. 169; Bingham v. Lipman, 40 Ore. 363, 67 Pac. Rep. 98; Johnson v. Ebberts, 11 Fed. Rep. 129; Harness v. Steele, 159 Ind. 286, 64 N. E. Rep. 875.

An improper motive may be inferred from a wrongful act based upon no reasonable ground. Such

[4] Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. Rep. 191.

fendant is a proper matter for proof where such damages are recoverable.[1] The absence of malice and proof of good faith will be no justification of an unlawful imprisonment, nor exempt the wrong-doer from the payment of actual damages.[2] Exemplary damages should not be allowed against an officer who makes or causes an illegal arrest unless he acts in bad faith, or is guilty of some oppression or misconduct.[3] But where an officer is guilty of bad faith, or one not an officer sets the law in motion and causes an arrest on process in bad faith, the jury will be warranted in allowing liberal damages.[4] Exemplary damages may be awarded in a proper case, though there is no proof of actual damage.[5] But these should not be awarded against an employer unless the acts of the employee were wanton and malicious and the former was implicated with the latter in such acts or expressly or impliedly ratified them.[6] Where the officers actually wielding the whole executive power of a corporation participate in and direct all that was planned and done in relation to the imprisonment, their malicious, wanton or oppressive intent may be regarded as the intent of the corporation, for which it must answer in exemplary damages.[7] So far as damages depend on malice and would be enhanced by it, they will be reduced by proof which negatives malice. Evidence of good faith is therefore generally admis-

motive constitutes legal malice; the act need not be prompted by anger, malevolence or vindictiveness. Bolton v. Vellines, 94 Va. 393, 404, 26 S. E. Rep. 847, 64 Am. St. 737; Harness v. Steele, *supra*.

A plea of justification if not proved authorizes the jury to allow additional damages. Ocean Steamship Co. v. Williams, 69 Ga. 251.

[1] Tucker v. Winders, 130 N. C. 147, 41 S. E. Rep. 8. See §§ 404, 405, 1254.

[2] Mitchell v. Malone, 77 Ga. 301; Patzack v. Von Gerichten, 10 Mo. App. 424; Painter v. Ives, 4 Neb. 122; Comer v. Knowles, 17 Kan. 440, 441; Newton v. Locklin, 77 Ill. 103; Carey v. Sheets, 60 Ind. 17; Van Deusen v. Newcomer, 40 Mich. 90; McCall v. McDowell, Deady, 233.

[3] Hamlin v. Spaulding, 27 Wis. 360; La Roe v. Roeser, 8 Mich. 537; McCall v. McDowell, Deady, 233; Dinsman v. Wilke, 12 How. 405.

[4] Marsh v. Smith, 49 Ill. 399; Fellows v. Goodman, 49 Mo. 62; Harris v. Louisville, etc. R. Co., 35 Fed. Rep. 116; Union Depot & R. Co. v. Smith, 16 Colo. 361, 27 Pac. Rep. 329; Petit v. Colmary, 55 Atl. Rep. 344 (Del.); Newburn v. Durham, 10 Tex. Civ. App. 655, 32 S. W. Rep. 112. See Wells v. Johnston, 52 La. Ann. 713, 27 So. Rep. 185.

[5] Blanchard v. Burbank, 16 Ill. App. 375; Hight v. Naylor, 86 id. 508.

[6] Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. Rep. 169.

[7] Bingham v. Lipman, 40 Ore. 363, 371, 67 Pac. Rep. 98.

sible in mitigation; but this mitigation will be limited to the damages it tends to controvert.[1] Evidence of provocation can be received only in mitigation of exemplary damages.[2] If it is shown in mitigation that the plaintiff was strongly suspected and accused by the public of the crime for which he was arrested, the latter may show his good character and reputation in rebuttal;[3] but if his character is not assailed evidence concerning it is not admissible.[4] If money or property has been taken from the plaintiff by the defendant it may be recovered if it is declared for.[5] The plaintiff's ability to have paid the fine imposed and avoided the imprisonment complained of does not affect the measure of his recovery.[6] There are, however, authorities which deny the right of action where one submits to arrest and imprisonment rather than pay a small license fee exacted from him, and which, if paid, could have been recovered.[7] This doctrine seems to accord with the principle which denies damages which the plaintiff might have prevented by the exercise of reasonable diligence. Evidence that the plaintiff has a wife and children is not admissible; neither is evidence that after his arrest the defendant brought an action against the plaintiff and garnished a third party who was supposed to have the money which was the cause of the imprisonment.[8]

[1] Barnes v. Viall, 6 Fed. Rep. 661; Brown v. Chadsey, 39 Barb. 262; Fenelon v. Butts, 53 Wis. 344, 10 N. W. Rep. 501; Little v. Munson, 54 Ill. App. 437; Karner v. Stump, 12 Tex. Civ. App. 460, 34 S. W. Rep. 656; Comer v. Knowles, 17 Kan. 441; Palmer v. Maine Central R. Co., 92 Me. 399, 412, 42 Atl. Rep. 800, 69 Am. St. 513, 44 L. R. A. 673; McMullin v. Erwin, 69 Vt. 338, 38 Atl. Rep. 62. See Robinson v. Clark, 53 Ill. App. 368.

[2] Grace v. Dempsey, 75 Wis. 313, 43 N. W. Rep. 1127.

[3] American Exp. Co. v. Patterson, 73 Ind. 430.

[4] Davis v. Sanders, 133 Ala. 275, 32 So. Rep. 499.

[5] Blanchard v. Burbank, 16 Ill. App. 375.

[6] Barker v. Anderson, 81 Mich. 508, 45 N. W. Rep. 1108. Compare Yost v. Tracy, 13 Utah, 431, 45 Pac. Rep. 346.

[7] Cottam v. Oregon City, 98 Fed. Rep. 570; Trescott v. Waterloo, 26 id. 592.

[8] Bergeron v. Peyton, 106 Wis. 377, 382, 82 N. W. Rep. 291.

CHAPTER XXXVII.

DAMAGES RESULTING FROM DEATH.

§ 1259. No action for at common law.
1260. Nature of the statutory action.
1261. Diversities as to beneficiaries.
1262. Only pecuniary losses compensated in England and Canada.
1263. Same subject; rule in the United States.
1264. At least nominal damages recoverable.
1265. Recovery by widow.
1266. Recovery by husband.
1267. Children's loss from death of parents.
1268–1271. Facts and circumstances to be considered in estimate of damages.
1272–1275. Recovery for death of child.
1276. Damages recoverable by collateral kindred.
1277. Damages to the deceased's estate.
1278. Special damages.
1279. Contracts exempting from liability.
1280. Where the injury is done in another state.

§ 1259. No action for at common law. By the common law all right of action for personal injury, whether it be the cause of death or not, is extinguished by the death of the injured party; the cause of action dies with the person entitled to sue.[1] By that law the death of a human being is not a private wrong and no compensation therefor or for any resulting loss is recoverable.[2] The same doctrine prevails under the general maritime law where death is the result of negligence.[3]

[1] Broom's Leg. Max. 400; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 545.

[2] Insurance Co. v. Brame, 95 U. S. 754; The Harrisburg, 119 id. 199, 7 Sup. Ct. Rep. 140; Nickerson v. Harriman, 38 Me. 277; Carey v. Berkshire R. Co., 1 Cush. 475; Connecticut Mut. Ins. Co. v. New York R. Co., 25 Conn. 272, 65 Am. Dec. 571; Green v. Hudson River R. Co., 28 Barb. 9, 2 Keyes, 294; Worley v. Cincinnati R. Co., 1 Handy, 481; Pennsylvania R. Co. v. Adams, 55 Pa. 499; Selma R. Co. v. Lacey, 49 Ga. 106; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Indianapolis, etc. R. Co. v. Keely, 23 Ind. 133; Hyatt v. Adams, 16 Mich. 180; Kramer v. San Francisco Street R. Co., 25 Cal. 434; Grosso v. Delaware, etc. R. Co., 50 N. J. L. 317; Eden v. Lexington R. Co., 14 B. Mon. 204.

[3] In re La Bourgogne, 117 Fed. Rep. 261.

Various reasons have been suggested to account for this rule; and it is probable that they have not wholly lost their force.[1] The rule does not, however, prevent an action by the master for the loss of the services of his apprentice or by the husband for those of his wife by a wrongful personal injury though death ensue; since in these cases the action accrued to the master or husband, and no reasons exist for holding that the death of the injured servant or wife could affect it.[2] By parity of reason, why should not the parent have his action for a like loss in case of injury to his infant child, notwithstanding the death of such child?[3] In these cases the damages are not the result of the death but of the wrongful act disabling the person from whom the plaintiff had the right to service, and the recovery is limited to the loss during the interval between the injury and the death.[4]

The common-law rule has been abrogated by statutes in all or nearly all the states of the Union as well as in England. These provide that compensation may be recovered for the injury or pecuniary loss resulting from the death of a person, caused by the wrongful act or negligence of another. For reasons connected with the public good this modern legislation has in special cases, and for the benefit of particular persons

[1] See Hyatt v. Adams, Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., Grosso v. Delaware, etc. R. Co., Worley v. Cincinnati, etc. R. Co., *supra.*

[2] Such cases are distinguishable from those in which death is the fact on which the right of action depends, as in Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., *supra*, in which a life insurance company unsuccessfully sought to recover from a railroad company damages for negligently causing the death of a person whose life it had insured, thereby subjecting it to the payment of the policy.

[3] Eden v. Lexington, etc. R. Co., 14 B. Mon. 204: Hyatt v. Adams, 16 Mich. 191; Jackson v. Pittsburgh, etc. R. Co., 140 Ind. 241, 39 N. E. Rep. 663, 49 Am. St. 192; Sorensen v. Balaban, 11 App. Div. 164, 42 N. Y. Supp. 645.

Burial expenses of a child are the result of its death, and cannot be recovered except under a statute. Jackson v. Pittsburgh, etc. R. Co., *supra.*

In Baker v. Bolton, 1 Camp. 493, Lord Ellenborough ruled that the husband might recover for distress of mind and loss of society from the moment of the injury to his wife up to the time of her death, but that in a civil court the death of a human being could not be complained of as an injury; and the damages to the plaintiff because of the injury to his wife must stop with the period of her existence.

[4] Jackson v. R. Co., Sorenson v. Balaban, *supra.*

and to a limited amount, created a liability for injuries resulting from death where caused by misconduct of a certain specified character. These enactments subject the wrong-doer to damages which are to be appropriated as is just for the benefit of those who, in ordinary cases, would be the greatest pecuniary sufferers.[1] Because the death of the intestate is the fact which gives the right of action the damages recoverable are to be measured by the law in force when that event occurred, and not the statute in effect when the injury which resulted in death was sustained.[2] Courts of admiralty give effect to such statutes when they are operative in the territory in which life was lost,[3] and this may be done in proceedings by the owner of the vessel which was the cause of the death for a limitation of his liability under the federal statute.[4]

§ **1260. Nature of the statutory action.** By statute in some states the right of action of the injured party survives for all damages which he was entitled to recover; it is preserved notwithstanding his death. But there is not recoverable in an action which so survives any damages which resulted from the death.[5] Such legislation and the rights accruing thereunder are therefore not germane to the subject of this chapter.[6] In some states provision is made by statute for the survival of the action which accrued to the deceased for all the damages he was entitled to recover; and also damages resulting to the parties for whose use and benefit the action survives from the death, consequent upon the injuries received.[7] The latter dam-

[1] Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., 25 Conn. 275, 65 Am. Dec. 571.

[2] Weber v. Third Avenue R. Co., 12 App. Div. 512, 42 N. Y. Supp. 789.

[3] The Harrisburg, 119 U. S. 199, 7 Sup. Ct. Rep. 140.

[4] The Northern Queen, 117 Fed. Rep. 906.

[5] Wetherell v. Chicago City R. Co., 104 Ill. App. 357; Kyes v. Valley Tel. Co., — Mich. —, 93 N. W. Rep. 623.

[6] See Goodsell v. Hartford, etc. R. Co., 33 Conn. 51; Olivier v. Houghton County Street R. Co., — Mich. —, 96 N. W. Rep. 434.

[7] Code of Tennessee, §§ 2291, 2292, act of March, 1883; Illinois Central R. Co. v. Crudup, 63 Miss. 291; Louisville, etc. R. Co. v. Burke, 6 Cold. 45; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Holton v. Daly, 106 Ill. 131; Merrihew v. Chicago City R. Co., 92 Ill. App. 346.

In Tennessee all the damages resulting from the death of a wife and mother, including those sustained by her infant child, are to be recovered by the husband as administrator. Railroad v. Johnson, 97 Tenn. 667, 37 S. W. Rep. 558.

In Michigan the right of action given by statute to the personal representatives of the deceased for the

ages are those generally provided for in statutes which are the subject of this chapter. In this country they are chiefly modeled after the English statute commonly called Lord Camp-

personal injury resulting from his negligent killing and that which survives under another statute, for negligent injuries to persons, are not separate and distinct causes of action, nor is the remedy under the latter statute excluded because death ultimately ensued from the injury. Dolson v. Lake Shore, etc. R. Co., 128 Mich. 444, 87 N. W. Rep. 629. Compare Hurst v. Detroit City R. Co., 84 Mich. 539, 48 N. W. Rep. 44.

The opposing view is held in Colorado. Kelley v. Union Pacific R. Co., 16 Colo. 455, 27 Pac. Rep. 1058.

In Kentucky one statute provides for the survival of actions for personal injuries and another for the recovery of damages resulting from death when it is caused by any wrongful act or negligence. Under the former there can be no recovery where the injury causes immediate death, for then there was in the decedent no right of action to survive. It is otherwise if there was an appreciable interval. It is held in that state, where the personal injury causes death not instantly, that there is an election to sue under either provision; but recovery under one bars recovery under the other. Hansford v. Payne, 11 Bush, 380; Connor v. Paul, 12 id. 144.

In Illinois, under similar provisions, it is held that an action which survives is for a personal injury which does not cause death; that an action given for recovery of damages which result from death is the only action for the negligence or fault which causes it. Holton v. Daly, 106 Ill. 131.

The same is held in Kansas. McCarthy v. Railroad Co., 18 Kan. 46, 26 Am. Rep. 742; Eureka v. Merrifield, 53 Kan. 794, 37 Pac. Rep. 113; Martin v. Missouri Pacific R. Co., 58 Kan. 475, 49 Pac. Rep. 605. See Hulbert v. Topeka, 34 Fed. Rep. 510. And in Rhode Island. Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. Rep. 205. See Southern Bell Telephone & Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. Rep. 881, where the question is discussed in its bearings upon another issue.

In Maine the damages resulting from death are allowed only in cases where the death was instantaneous; and where the injured person does not die immediately the action survives and no other remedy is needed. State v. Maine Central R. Co., 60 Me. 490; State v. Grand Trunk R., 61 id. 114, 14 Am. Rep. 552.

The same rule has been applied to ch. 124, laws of 1891. Sawyer v. Perry, 88 Me. 42, 33 Atl. Rep. 660.

The language of the statutes where survival of actions for personal injury is provided for and there is also provision for recovery of damages resulting from death is broad enough to entitle the personal representative to recover the damages which accrue to the decedent and also those which result from the death ensuing from the same injury. As appears by the foregoing cases, there is a reluctance in the states from which those citations are taken to allow damages in this broad sense, or to regard those statutes as affording a right to cumulative damages. The actions thus provided for give damages mostly of a different nature, and it would seem quite consistent with the policy of the statutes, if not necessary to their natural force and operation, to allow both classes of damages. To hold otherwise, if death ensues from the

bell's Act, the text of which will be found in a note.[1] There has been some diversity of expression as to the limits of the cause of action thus created.[2] A personal injury by the defendant's wrongful act, neglect or default is the basis of his

personal injury for which the injured person has a right of action, is unwarrantably to restrict the operation of the statute. There is nothing on the face of these statutes to make one operate to repeal the other or to require an election under which the action should be brought, with the effect of renouncing the right given by the other.

The view expressed in this note is in accord with Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 So. Rep. 537; Davis v. Railway, 53 Ark. 117, 13 S. W. Rep. 801, 7 L. R. A. 283; Brown v. Chicago, etc. R. Co., 102 Wis. 137, 77 N. W. Rep. 748, 78 id. 771, 44 L. R. A. 579; Hurst v. Detroit City R. Co., 84 Mich. 539, 48 N. W. Rep. 44 (but see Dolson v. Lake Shore, etc. R. Co., *supra*); Leggott v. Great Northern R. Co., 1 Q. B. Div. 599; Robinson v. Canadian Pacific R. Co., [1892] App. Cas. 481; Needham v. Grand Trunk R. Co., 38 Vt. 294 (compare the last case with Legg v. Britton, 64 Vt. 652, 24 Atl. Rep. 1016); Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400, 30 Pac. Rep. 714; Connors v. Burlington, etc. R. Co., 71 Iowa, 490, 32 N. W. Rep. 465, 60 Am. Rep. 814; Putnam v. Southern Pacific R. Co., 21 Ore. 230, 27 Pac. Rep. 1033; Belding v. Black Hills, etc. R. Co., 3 S. D. 369, 53 N. W. Rep. 750; Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824, 8 So. Rep. 586. See Mulchahey v. Washburn Car Wheel Co., 145 Mass. 281, 14 N. E. Rep. 106, 1 Am. St. 458.

Under the Pennsylvania statute providing for the survival of actions in negligence cases where the plaintiff dies, recovery may be had, not only for the mental and physical suffering up to the time of death and diminution of earning power during the period he would probably have lived, but also for the value of his life. Maher v. Philadelphia Traction Co., 181 Pa. 391, 37 Atl. Rep. 571. By the value of the life is meant, not its value to others, but the value of the advantages of which the injured

[1] 9 and 10 Vict., ch. 93. It recites that no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him; and enacts that whensoever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

[2] Blake v. Midland R. Co., 18 Q. B. 93; Read v. Great Eastern R. Co., L. R. 3 Q. B. 555; Barnett v. Lucas, Irish Rep. 6 C. L. 247; Pym v. Great Northern R. Co., 2 B. & S. 759; Leggott v. Great Northern R. Co., 1 Q. B. Div. 599; Safford v. Drew, 3 Duer, 627; Whitford v. Panama R. Co., 23 N. Y. 465; Holton v. Daly, 106 Ill. 131.

liability, but only because it produces death, and the liability is only for the damages which result from the death to those for whose use and benefit the statutory action is given. It is a new cause of action because there is an element in it additional to that which constituted the cause of action in favor of the person injured, viz.: death must ensue as a consequence of the injury to him.[1] It is a different cause of action also, because only the damages which ensue from the death are recoverable. It is essential that the personal injury which causes

party was deprived because of the diminution or loss of earning power. No damages can be recovered for the loss which other persons sustained by reason of the death. McCafferty v. Pennsylvania R. Co., 193 Pa. 339, 44 Atl. Rep. 435, 74 Am. St. 690.

Under the statutes of Washington a father may maintain an action to recover for the death of his child notwithstanding the administrator of the child's estate may have recovered against the same defendant for causing the child's death. Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400, 30 Pac. Rep. 714.

A recovery by the personal representative for the death of the intestate while being carried under a contract does not affect the representative's right to recover for damage to the intestate's personal estate caused during his life-time by medical expenses and loss from inability to attend to business. Daly v. Dublin, etc. R. Co., 30 L. R. Ire. 514, following Bradshaw v. Lancashire & Y. N. Co., L. R. 10 C. P. 189.

[1] Andrews v. Hartford, etc. R. Co., 34 Conn. 57; In re Mayo's Estate, 60 S. C. 401, 38 S. E. Rep. 634; Weber v. Third Avenue R. Co., 12 App. Div. 512, 42 N. Y. Supp. 789; Perham v. Portland Electric Co., 33 Ore. 451, 53 Pac. Rep. 14, 40 L. R. A. 799, 73 Am. St. 730; The Oregon, 73 Fed. Rep. 846; Seward v. The Vera Cruz, L. R. 10 App. Cas. 59; Holland v. Brown, 35 Fed. Rep. 43; Hurlbert v. Topeka, 34 id. 510; Martin v. Missouri Pacific R. Co., 58 Kan. 475, 40 Pac. Rep. 605; Northern Pacific R. Co. v. Adams, 116 Fed. Rep. 324, 64 C. C. A. 196; Burns v. Grand Rapids R. Co., 113 Ind. 169, 15 N. E. Rep. 230; Lange v. Schoettler, 115 Cal. 388, 47 Pac. Rep. 139; Burk v. Arcata & M. R. R. Co., 125 Cal. 364, 57 Pac. Rep. 1065, 73 Am. St. 52; Cooper v. Shore Electric Co., 63 N. J. L. 558, 44 Atl. Rep. 633; Maney v. Chicago, etc. R. Co., 49 Ill. App. 105; McKay v. New England Dredging Co., 92 Me. 454, 43 Atl. Rep. 29; Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 153, 58 N. E. Rep. 50, 51 L. R. A. 235. See Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. Rep. 67.

No new right is given by the Missouri statute; the right of action is preserved and transmitted. Hennessy v. Bavarian Brewing Co., 145 Mo. 104, 112, 46 S. W. Rep. 966, 68 Am. St. 554, 41 L. R. A. 385; Brink v. Wabash R. Co., 160 Mo. 87, 60 S. W. Rep. 1058.

In Vermont the statute, which is nearly a copy of Lord Campbell's act, does not create a new and additional cause of action in favor of the beneficiaries, but provides for the recovery of a new class of damages if a right of action would have existed in the deceased but for his death. Legg v. Britton, 64 Vt. 652, 24 Atl. Rep. 1016.

the death appear to have proceeded from the wrongful act, neglect or default of the defendant.[1] Any evidence, therefore, which would be admissible in an action by the injured person to controvert that charge is equally admissible as a defense to the statutory action.[2] And it has been held that any subsequent matter of discharge, arising in the life-time and by the act of the injured party, sufficient to satisfy, bar or release his action will be fatal to the new action by his personal representatives if death ensue.[3] In Kentucky the statute is regarded

[1] The injury caused by the defendant need not be the only cause of death; if it be established that such injury set in motion other causes, which produced the disease and the death, and which, without the injury, would not have produced death, an action lies. Weber v. Third Avenue R. Co., 12 App. Div. 512, 42 N. Y. Supp. 789; Purcell v. Lauer, 14 App. Div. 33, 43 N. Y. Supp. 988. See Hoey v. Metropolitan Street R. Co., 70 App. Div. 60, 74 N. Y. Supp. 1113.

[2] Kelly v. Hendrie, 26 Mich. 255; Michigan Central R. Co. v Campau, 35 id. 468; Bresnahan v. Michigan Central R. Co., 49 Mich. 410, 13 N. W. Rep. 797; Tucker v. Chaplin, 2 C. & K. 730; Willetts v. Buffalo, etc. R. Co., 14 Barb. 588.

In McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260, it was held killing a man by inducing him to drink a pint of whisky was actionable.

If the person entitled to the benefit of the recovery contributed to cause the death it will defeat the action. Williams v. Railroad Co., 60 Tex. 205; Pittsburgh, etc. R. Co. v. Vining, 27 Ind. 513, 92 Am. Dec. 269; Baltimore, etc. R. Co. v. State, 30 Md. 47; Railway Co. v. Snyder, 24 Ohio St. 670. In the latter case the contributory negligence of the father in the exposure of his infant child to the injury which caused its death was held fatal to his action, though it would not have affected the action if the infant had survived.

Under the Ohio statute the damages are to be assessed with reference to the injury sustained by each beneficiary; such beneficiaries as contributed to the death of the decedent by contributory negligence cannot recover; those who did not so contribute are not affected by the contributory negligence of the others. Wolf v. Lake Erie & W. R. Co., 55 Ohio St. 517, 45 N. E. Rep. 708, 36 L. R. A. 812.

[3] Read v. Great Eastern R. Co., L. R. 3 Q. B. 555; Dibble v. New York & E. R. Co., 25 Barb. 183; Hecht v. Ohio & M. R. Co., 132 Ind. 507, 32 N. E. Rep. 302; Southern Bell Telephone & Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. Rep. 881 (two judges dissenting).

A settlement with the decedent held a bar. Whitford v. Panama R. Co., 23 N. Y. 484, per Comstock, J., dissenting. His release given the same effect. Holton v. Daley, 106 Ill. 131. So a recovery by him in his life-time and the judgment paid. Littlewood v. Mayor, 89 N. Y. 24, 42 Am. Rep. 271.

If the injured person began a suit in his life-time, which his administrator prosecuted to judgment after his death, such judgment bars a second suit for the benefit of the widow, although the recovery was solely for the injuries to the deceased in his life-time. Legg v. Britton, 64 Vt. 652, 24 Atl. Rep. 1016.

as giving a new cause of action, in which neither the deceased nor his administrator has any interest; hence the settlement of an action brought by him to recover for his injuries does not bar the widow's right to recover for his subsequent death.[1] The death of a person entitled to sue pending the suit neither abates the action in the common-law sense, nor is the cause of action to be compensated for discharged;[2] but in such a case the damages which may be recovered will be limited in duration and extent to the life-time of such person.[3] In the absence of any act done by the deceased to bar a suit by him if he had survived, the right of action is a vested right in favor of those who are authorized to sue, and cannot be affected by the payment of money, after the death of the person injured, to one who was his beneficiary in a relief fund established by the defendant.[4]

§ 1261. Diversities as to beneficiaries. The statutes under consideration do not provide uniformly for the same distribution of the fruits of recoveries. The most noticeable difference and the one which affects greatly the elements of damage is that between statutes which provide that the damages shall be distributed to the widow, husband and near kin of the deceased and those which provide that they shall be part of his estate. Under the former the beneficiaries may recover the amount of loss resulting to them from the death; under the latter no such inquiries are relevant, but the question is how much has his estate suffered by his death. The subject of damages under statutes in the first category will be considered, after remarking that it has been recently decided in Wisconsin that the general language employed in the statute thereof does not include non-resident aliens as beneficiaries where the deceased was instantly killed or died without conscious pain.[5]

§ 1262. Only pecuniary losses compensated in England and Canada. There is no dissent in the English decisions made since 1852 from the rule that damages cannot be

[1] Donahue v. Drexler, 82 Ky. 157, 56 Am. Rep. 886.

[2] Cooper v. Shore Electric Co., 63 N. J. L. 558, 44 Atl. Rep. 633; Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 58 N. E. Rep. 50, 51 L. R. A. 235.

[3] Cooper v. Shore Electric Co., *supra*.

[4] McKeering v. Pennsylvania R. Co., 65 N. J. L. 57, 46 Atl. Rep. 715, and cases cited.

[5] McMillan v. Spider Lake Sawmill & L. Co., 115 Wis. 332, 60 L. R. A. 589, 91 N. W. Rep. 980.

awarded for mental suffering or loss of society, but must be restricted to pecuniary loss. The language of Lord Campbell's act on this point is: "The jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively for whom or for whose benefit such action shall be brought." Its title is "an act for compensating the families of persons killed." It also provides that the amount recovered shall be divided amongst the parties mentioned in it in such shares as the jury by their verdict shall find and direct. These provisions in it and the difficulty of apportioning the damages for *solatium* materially influenced the court in reaching the conclusion that only pecuniary losses are within the intent of the law.[1] The Canadian statute is not unlike the English. The courts of Ontario have differed greatly as to the signification of the word "injury." The majority of the judges of the queen's bench division held that the damages resulting from the loss of a wife or mother, no matter how excellent her qualities or how faithful she might be in discharging her duties and promoting the material and moral condition and prospects of her children, are purely sentimental and not of a sufficiently pecuniary character to support an action. A majority of the judges of the court of appeal differed from this view and held that what is meant by pecuniary loss in all the decided cases in which the expression has been used is the loss of some benefit or advantage which is capable of being estimated in money as distinguished from mere sentimental losses. A majority of the supreme court of the Dominion of Canada concurred in this view.[2] The same court holds that no recovery can be had for *solatium* merely. This is the rule under the code of Lower Canada,[3] and in New Zealand.[4]

§ 1263. Same subject; rule in the United States. In some states the statutes provide in terms for the recovery of damages for a pecuniary injury, and in others the word pecuniary is not used, but the construction given is the same, restrict-

[1] Black v. Midland R. Co., 18 Q. B. 93.

[2] St. Lawrence, etc. R. v. Lett, 11 Can. Sup. Ct. 422; Lett v. St. Lawrence, etc. R., 11 Ont. App. 1, 1 Ont. 545.

[3] Canadian Pacific R. Co. v. Robinson, 14 Can. Sup. Ct. 105.

[4] Greymouth-Point Elizabeth R. & C. Co. v. McIvor, 16 N. Z. L. R. 258.

ing the damages to such injury. The theory of the statutes is that those for whom compensation is provided have a pecuniary interest in the life of the person killed, and consequently the amount of recovery is limited to the value of that interest.[1] The rule confining recoveries to pecuniary losses is not applied in a strict sense. "When we consider," says Fullerton, "the defect which the statute was designed to remedy, it is taking too narrow a view of the matter to say that the word *pecuniary* was used in so limited a sense as to embrace only losses of money."[2] "A liberal scope was designedly left for the action

[1] Oakes v. Maine Central R. Co., 95 Me. 103, 49 Atl. Rep. 418; Geiger v. Worthen & Co., 66 N. J. L. 576, 49 Atl. Rep. 918; In re California Navigation & Imp. Co., 110 Fed. Rep. 670; Kesler v. Smith, 66 N. C. 154; Telfer v. Northern R. Co., 30 N. J. L. 188; Quin v. Moore, 15 N. Y. 434; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago, etc. R. Co. v. Morris, 26 Ill. 400; Conant v. Griffin, 48 id. 412; Illinois Central R. Co. v. Weldon, 52 id. 295; Chicago v. Scholten, 75 id. 468; Baltimore, etc. R. Co. v. State, 24 Md. 271, 33 id. 542; Paulmier v. Erie R. Co., 34 N. J. L. 151; Kelley v. Chicago, etc. R. Co., 50 Wis. 381, 7 N. W. Rep. 291; Regan v. Chicago, etc. R. Co., 51 Wis. 599, 8 N. W. Rep. 292; McKeigue v. Janesville, 68 Wis. 50, 31 N. W. Rep. 298; Barley v. Chicago, etc. R. Co., 4 Biss. 430; Murphy v. New York, etc. R. Co., 88 N. Y. 445; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280, 87 Am. Dec. 391; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; James v. Christy, 18 Mo. 162; Owen v. Brockschmidt, 54 Mo. 285; Porter v. Hannibal, etc. R. Co., 71 Mo. 66, 36 Am. Rep. 454; Pennsylvania R. Co. v. McCloskey, 23 Pa. 526; Same v. Butler, 57 id. 335; Huntingdon, etc. R. Co. v. Decker, 84 id. 419; Catawissa R. Co. v. Armstrong, 52 id. 282; Pennsylvania R. Co. v. Bantom, 54 id. 495; Nashville R. Co. v. Stevens, 9 Heisk. 12; St. Louis, etc. R. Co. v. Rawley, 90 Ill. App. 653; McKay v. New England Dredging Co., 92 Me. 454, 43 Atl. Rep. 29; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. Rep. 360; James v. Richmond & D. R. Co., 92 Ala. 231, 9 So. Rep. 335; Orgall v. Chicago, etc. R. Co., 46 Neb. 4, 64 N. W. Rep. 450; Chicago, etc. R. Co. v. Young, 58 Neb. 678, 79 N. W. Rep. 556; May v. West Jersey & S. R. Co., 62 N. J. L. 67, 42 Atl. Rep. 165; Cincinnati Street R. Co. v. Altemeier, 60 Ohio St. 10; Gulf, etc. R. Co. v. Finley, 11 Tex. Civ. App. 64, 32 S. W. Rep. 51; Lehigh Iron Co. v. Rupp, 100 Pa. 95; Pennsylvania Co. v. Lilly, 73 Ind. 252; Klepsch v. Donald, 4 Wash. 436, 30 Pac. Rep. 991, 31 Am. St. 936; Lange v. Schoettler, 115 Cal. 388, 47 Pac. Rep. 139; Schmidt v. Menasha Woodenware Co., 99 Wis. 300, 74 N. W. Rep. 797; Denver, etc. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. Rep. 211; Malott v. Shimer, 153 Ind. 35, 54 N. E. Rep. 101.

[2] McIntyre v. New York Central R. Co., 37 N. Y. 295; Tilley v. Hudson River R. Co., 24 id. 471; Pennsylvania R. Co. v. Keller, 67 Pa. 300; Chicago, etc. R. Co. v. Porterfield, 19 Tex. Civ. App. 225, 46 S. W. Rep. 919; Sternfels v. Metropolitan Street R. Co., 73 App. Div. 494, 77 N. Y. Supp. 309; Gulf, etc. R. Co. v. Johnson, 1 Tex. Civ. App. 103, 20 S. W. Rep. 1123. But see Walker v. Lake Shore, etc. R. Co., 104 Mich. 606, 617, 62

of the jury; they are to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injury resulting from such death; they are not tied down to any precise rule. Within the limit of the statute as to amount, and the species of injury sustained, the matter is to be submitted to their sound judgment and discretion. They must be satisfied that pecuniary injury resulted. If so satisfied they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied from the history of the family or the intrinsic probabilities of the case that they were sustained by the loss of bodily care or intellectual culture, or moral training which the mother had before supplied, they are at liberty to allow for it."[1]

There is almost entire harmony in denying a recovery for the mental suffering of the beneficiaries of the deceased, or as a *solatium*.[2] In some states the language of the statutes has

N. W. Rep. 1032, 111 Mich. 518, 69 N. W. Rep. 1114; Ewen v. Chicago & N. R. Co., 38 Wis. 613.

[1] Tilley v. Hudson River R. Co., 29 N. Y. 252, 286–7; Phalen v. Rochester R. Co., 31 App. Div. 448, 52 N. Y. Supp. 836; Walker v. McNeill, 17 Wash. 582, 50 Pac. Rep. 518.

It is said in Webb v. Denver, etc. R. Co., 7 Utah, 17, 23, 26 Pac. Rep. 981: The word "pecuniary" in this connection is not construed in any very strict sense, and the tendency is to still greater liberality, and to include every element of injury that may be deemed to have a pecuniary value, athough this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral and physical training which a mother only can give to children. Tilley v. Hudson River R. Co., *supra*. It may include the loss of expected services of children who, at the time of their death, are too young to render any service (Ihl v. Forty-second Street, etc. R. Co., 47 N. Y. 317, 7 Am. Rep. 450); or of children or persons under no legal or moral obligation to render service or support, if the circumstances shown render it probable it will be rendered (Chicago & N. R. Co. v. Bayfield, 37 Mich. 205; Railroad Co. v. Barron, 5 Wall. 90). It may include the loss of the society of a near relative (Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20), and may include damages for the loss of the father by children who are of full age, living away from the home of the deceased and supporting themselves. Lockwood v. New York, etc. R. Co., 98 N. Y. 523.

[2] Kansas Pacific R. Co. v. Miller, 2 Colo. 465, 466; Illinois Central R. Co. v. Benz, 108 Tenn. 670, 58 L. R. A. 690, 69 S. W. Rep. 317; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago, etc. R. Co. v. Morris, 26 Ill. 400; Chicago, etc. R. Co. v. Shannon, 43 id. 346; Illinois Central R. Co. v. Weldon, 52 id. 290; Holton v. Daly, 106 id. 131; Chicago, etc. R. Co. v. Harwood, 80 id. 88; Oakes v. Maine Central R. Co., 95 Me. 103, 49 Atl. Rep. 418; Covington Street R. Co. v.

been regarded as warranting a recovery for the wounded feelings of the beneficiaries. Under a statute empowering the jury to give "such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought," the wounded feelings of the beneficiaries may be considered in estimating the damages.[1] The Virginia statute permits the jury to award such damages as to it may seem fair and just. Under it punitive damages may be awarded, and the jury may consider the mental suffering of those for whose benefit the action was prosecuted.[2] A later case, however, treats the question as an open one.[3] The same conclusion was announced in a California case ruled under a like statute;[4] but that case was soon disapproved, and the rule declared to be that in estimating the pecuniary losses of a wife from the death of her husband the jury may consider whether or not the deceased was a good husband, able and willing to provide well for his wife.[5] Though it be provided by statute that "all causes

Packer, 9 Bush, 455, 15 Am. Rep. 725; Barley v. Chicago, etc. R. Co., 4 Biss. 430; Etherington v. Prospect Park, etc. R. Co., 88 N. Y. 641; Freeman v. Railroad, 107 Tenn. 340, 64 S. W. Rep. 1; North Chicago Street R. Co. v. Brodie, 156 Ill. 317, 40 N. E. Rep. 942; O'Fallon Coal Co. v. Laquet, 89 Ill. App. 13; Commercial Club v. Hilliker, 20 Ind. App. 239, 50 N. E. Rep. 578; Railroad v. Wyrick, 99 Tenn. 500, 42 S. W. Rep. 434; Taylor, etc. R. Co. v. Warner, 84 Tex. 122, 19 S. W. Rep. 449, 20 id. 823; McGown v. International & G. N. R. Co., 85 Tex. 289, 20 S. W. Rep. 80; St. Louis, etc. R. Co. v. Freeman, 36 Ark. 41; Kake v. Horton, 2 Hawaiia, 209; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280, 87 Am. Dec. 391; Southwestern R. Co. v. Paulk, 24 Ga. 356, 366; Hyatt v. Adams, 16 Mich. 180; Webb v. Denver, etc. R. Co., 7 Utah, 17, 26 Pac. Rep. 981; Lazelle v. Newfane, 70 Vt. 440, 41 Atl. Rep. 511; Walker v. McNeill, 17 Wash. 582, 50 Pac. Rep. 518; Hunt v. Conner, 26 Ind. App. 41, 59 N. E. Rep. 50; Stuckey v. Atlantic Coast L. R. Co., 60 S. C. 237, 38 S. E. Rep. 416; Florida Central & P. R. Co. v. Foxworth, 41 Fla. 1, 76, 25 So. Rep. 338; Barth v. Kansas City E. R. Co., 142 Mo. 535, 556, 44 S. W. Rep. 778; Knight v. Sadtler Lead & Zinc Co., 75 Mo. App. 541, 550; Regan v. Chicago, etc. R. Co., 51 Wis. 599, 8 N. W. Rep. 292; Green v. Southern Pacific Co., 122 Cal. 563, 55 Pac. Rep. 577; Wells v. Denver, etc. R. Co., 7 Utah, 482, 27 Pac. Rep. 688; Webb v. Same, 7 Utah, 17, 24 Pac. Rep. 616; Mobile & O. R. Co. v. Watly, 69 Miss. 145, 12 So. Rep. 558; International, etc. R. Co. v. Boykin, 74 S. W. Rep. 93.

[1] Nohrden v. Northeastern R. Co., 59 S. C. 87, 105, 37 S. E. Rep. 228.

[2] Matthews v. Warner, 29 Gratt. 570, 26 Am. Rep. 396.

[3] Norfolk & W. R. Co. v. Stevens' Adm'r, 97 Va. 631, 34 S. E. Rep. 525, 46 L. R. A. 367.

[4] Cleary v. City R. Co., 76 Cal. 240, 18 Pac. Rep. 269.

[5] Morgan v. Southern Pacific Co.,

of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same," pain and suffering resulting from an injury are not elements of damage in an action by the administrator of the injured person brought to recover damages to the latter's estate.[1]

In some states the constitutions or statutes provide for the recovery of exemplary damages.[2] The right to recover such damages is given by the constitution of Kentucky: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same." This language includes, not alone compensatory damages, but all varieties of damages known to the law.[3] In Washington under a statute allowing the recovery of pecuniary or exemplary damages, both cannot be recovered in every case; but in case of mere neglect the pecuniary loss measures the recovery; in case of injury caused by moral or legal wrong, amounting to wilfulness, exemplary damages may be added.[4] Under the Alabama act, which provides for the recovery of such damages as the jury may assess, the damages are punitive and exemplary in every case — puni-

95 Cal. 510, 30 Pac. Rep. 613; Munro v. Pacific Coast Dredging & R. Co., 84 Cal. 515, 527, 24 Pac. Rep. 303, 18 Am. St. 248.

There is no legal connection between negligence resulting in the death of a person and a physical injury caused by a nervous shock produced by news of the death upon the mother of the deceased. Norfolk & W. R. Co. v. Stevens' Adm'r, 97 Va. 631, 635, 34 S. E. Rep. 525, 46 L. R. A. 367.

[1] Dwyer v. Chicago, etc. R. Co., 84 Iowa, 479, 51 N. W. Rep. 244; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5, 46 N. W. Rep. 79.

[2] Louisville, etc. R. Co. v. Orr, 91 Ala. 548, 8 So. Rep. 360; Thompson v. Louisville, etc. R. Co., 91 Ala. 496, 8 So. Rep. 406, 11 L. R. A. 146; Kansas Pacific R. Co. v. Miller, 2 Colo. 467; Same v. Lundin, 3 id. 100; Turner v. Norfolk & W. R. Co., 40 W. Va. 675, 22 S. E. Rep. 83 (but see Couch v. Chesapeake & O. R. Co., 45 W. Va. 51, 30 S. E. Rep. 147, the judges being equally divided in opinion); Matthews v. Warner, 29 Gratt. 570, 26 Am. Rep. 396; Gray v. McDonald, 104 Mo. 303, 16 S. W. Rep. 398; Barth v. Kansas City E. R. Co., 142 Mo. 535, 558, 44 S. W. Rep. 778.

The California statute formerly provided for the recovery of exemplary damages; but, owing to a change in its language, they are not now recoverable. Lange v. Schoettler, 115 Cal. 388, 47 Pac. Rep. 139.

[3] Louisville & N. R. Co. v. Kelly's Adm'x, 100 Ky. 421, 38 S. W. Rep. 852, 40 id. 452. But compare Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. Rep. 360.

[4] Klepsch v. Donald, 4 Wash. 436, 444, 30 Pac. Rep. 991, 31 Am. St. 936.

tive of the act done and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs or to incite to diligence in the avoidance of fatal casualties — the purpose being the preservation of human life regardless of the pecuniary value of a particular life to the next of kin under statutes of distribution. The admeasurement of the recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act or in the omission to act as required by the dictates of care and prudence, and without any reference to, or consideration of, the loss or injury the act or omission may occasion to the living.[1] Under the Nevada statute it is not required that the complaint specify what portion, or whether any, of the damages asked are claimed as exemplary.[2] The constitution of Texas provides that in case of wilful homicide there shall be responsibility for exemplary damages. Where a case is within that provision the jury may be directed to award such damages.[3] Exemplary damages are recoverable under the civil damage statutes of Illinois and Michigan.[4] In New York interest is recoverable from the date of death in accordance with the general rule relating to injuries to property.[5]

§ 1264. At least nominal damages recoverable. In England and some states of the Union some actual damages must be shown as essential to the maintenance of the action; merely to show that, in other respects, the facts bring the case within the statute will not entitle the plaintiff to nominal damages.[6] There is reasonable ground for this doctrine where the statute

[1] Richmond & D. R. Co. v. Freeman, 97 Ala. 289, 294, 11 So. Rep. 800, following previous cases; Louisville & N. R. Co. v. Tegner, 125 Ala. 593, 28 So. Rep. 510; Louisville & N. R. Co. v. Lansford, 102 Fed. Rep. 62, 42 C. C. A. 160; McGhee v. McCarley, 103 Fed. Rep. 55, 44 C. C. A. 252.

[2] Peers v. Nevada Power, L. & W. Co., 118 Fed. Rep. 400.

[3] Morgan v. Barnhill, 118 Fed. Rep. 24, 55 C. C. A. 1.

[4] Belting v. Hobbett, 142 Ill. 72, 30 N. E. Rep. 1048; Lafler v. Fisher, 121 Mich. 60, 79 N. W. Rep. 934.

[5] Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 149, 58 N. E. Rep. 50, 51 L. R. A. 235.

[6] Duckworth v. Johnson, 4 H. & N. 653; Boulter v. Webster, 13 Week. Rep. 289; Lazelle v. Newfane, 70 Vt. 440, 446, 41 Atl. Rep. 511; McGown v. International, etc. R. Co., 85 Tex. 289, 20 S. W. Rep. 80; Cooper v. Shore Electric Co., 63 N. J. L. 558, 567, 44 Atl. Rep. 633; Rouse v. Detroit Electric R., 128 Mich. 149, 87 N. W. Rep. 68.

requires that the damages shall be apportioned among the beneficiaries.[1] The general rule in the United States is that at least nominal damages may be recovered. "The only condition," says Comstock, J., "on which the right of the administrator to sue under the statute depends is the common-law right of the injured person to maintain an action if he were living."[2] "It may be added," he said, "that, as the statute expressly gives the right of action, nominal damages at least could be recovered."[3] And where the action is given for the benefit of the widow or next of kin, and it appears that there are such, there may be a recovery to that extent, though no actual or substantial loss to them be shown.[4] Where collateral kindred are the parties in interest proof of damage must be made or nominal damages cannot be recovered,[5] at least in a court of admiralty.[6] Actual damages resulting from the death are made recoverable by a variety of expressions in the several statutes, but they are all interpreted in general to indicate substantially the same view on phases of the injury. The main inquiry is, what is the pecuniary loss to those persons for whose benefit in a particular case the action is brought? What aid or advantage, having a pecuniary value, have these persons lost by reason of the death? This inquiry is considerably diversified by the different relationships embraced by the statute.

[1] Shallue v. Long Tunnel Gold Mining Co., 10 Vict. L. R. (law) 56.

[2] Quin v. Moore, 15 N. Y. 434.

[3] Id.; Lyons v. Cleveland, etc. R. Co., 7 Ohio St. 337, 70 Am. Dec. 75; St. Louis, etc. R. Co. v. Blinn, 10 Kan. App. 468, 62 Pac. Rep. 427; Pizzi v. Reid, 72 App. Div. 162, 76 N. Y. Supp. 306. Compare Regan v. Chicago, etc. R. Co., 51 Wis. 599, 8 N. W. Rep. 292.

[4] Rockford, etc. R. Co. v. Delaney, 82 Ill. 198; Johnson v. Missouri Pacific R. Co., 18 Neb. 690, 26 N. W. Rep. 347; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Shannon, 43 id. 338; Grotenkemper v. Harris, 25 Ohio St. 510; Pennsylvania R. Co. v. Keller, 67 Pa. 300; North Pennsylvania R. Co. v. Kirk, 90 id. 15; Howard v. Delaware & H. R. C. Co., 40 Fed. Rep. 195; Kelley v. Chicago, etc. R. Co., 50 Wis. 381, 7 N. W. Rep. 291; North Chicago Street R. Co. v. Brodie, 156 Ill. 317, 40 N. E. Rep. 942; Burk v. Arcata & M. R. R. Co., 125 Cal. 364, 57 Pac. Rep. 1065, 73 Am. St. 52; Chicago, etc. R. Co. v. Gunderson, 174 Ill. 495, 51 N. E. Rep. 708; Anderson v. Chicago, etc. R. Co., 35 Neb. 95, 102, 52 N. W. Rep. 840; Jenkins v. Hankins, 98 Tenn. 545, 559, 41 S. W. Rep. 1028; Broughel v. Southern New England Telephone Co., 73 Conn. 614, 48 Atl. Rep. 751. But see Hurst v. Detroit City R. Co., 84 Mich. 539, 548, 48 N. W. Rep. 44.

[5] Chicago, etc. R. Co. v. Gunderson, *supra*.

[6] In re California Navigation & Imp. Co., 110 Fed. Rep. 670.

This consideration justifies separate generalization of the action relative to each class of beneficiaries.

§ 1265. Recovery by widow. The recovery by a widow of damages resulting to her from the death of her husband will be governed by the general rule applicable to all the beneficiaries provided for by the statute, which is the present value of her reasonable expectation of pecuniary advantage from the continuance of the life of the deceased,[1] regard being had to the prospect of his advancement and increased salary as a member of a fire department, but evidence as to the specific salaries of the higher positions therein was not admissible.[2] The damages recoverable by her will include the value of her support by and the protection of her husband during the time he would probably have lived and supported her but for his death.[3] The jury may also consider the addition that the earnings of the deceased would probably have made to his

[1] David v. Southwestern R. Co., 41 Ga. 223; Potter v. Chicago, etc. R. Co., 21 Wis. 372, 94 Am. Dec. 548; Louisville, etc. R. Co. v. Case, 9 Bush, 728; Railroad Co. v. Barron, 5 Wall. 93; Telfer v. Northern R. Co., 30 N. J. L. 188; Rafferty v. Buckman, 46 Iowa, 195; Louisville, etc. R. Co. v. Stacker, 86 Tenn. 343, 6 Am. St. 840, 6 S. W. Rep. 737; Central R. Co. v. Thompson, 76 Ga. 770; San Antonio Traction Co. v. White, 94 Tex. 468; Harrison v. Sutter Street R. Co., 116 Cal. 156, 47 Pac. Rep. 1079; Hayes v. Williams, 17 Colo. 465, 474, 30 Pac. Rep. 352; Williams v. Walton, 9 Houst. 322, 32 Atl. Rep. 726; Louisiana Extension R. Co. v. Carstens, 19 Tex. Civ. App. 190, 47 S. W. Rep. 36; English v. Southern Pacific Co., 13 Utah, 407, 421, 45 Pac. Rep. 47, 57 Am. St. 772, 35 L. R. A. 155; Abbot v. McCadden, 81 Wis. 563, 51 N. W. Rep. 1079, 29 Am. St. 910; Liermann v. Chicago, etc. R. Co., 82 Wis. 286, 52 N. W. Rep. 91, 33 Am. St. 37; Harkins v. Pullman Palace Car Co., 52 Fed. Rep. 724; May v. West Jersey & S. R. Co., 62 N. J. L. 67, 42 Atl. Rep. 165; McHugh v. Schlosser, 159 Pa. 480, 28 Atl. Rep. 291, 39 Am. St. 699, 23 L. R. A. 574; Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 62 Am. St. 121, 10 So. Rep. 507; Oakes v. Maine Central R. Co., 95 Me. 103, 49 Atl. Rep. 418; McLean v. Board of Land & Works, 7 Vict. L. R. (law) 259.

[2] Geary v. Metropolitan Street R. Co., 73 App. Div. 441, 77 N. Y. Supp. 54.

[3] Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. Rep. 1109.

The words "necessary injury" include any damages which may be estimated according to a pecuniary standard, whether present, prospective or proximate. Barth v. Kansas City E. R. Co., 142 Mo. 535, 559, 44 S. W. Rep. 778.

In Florida if the allowance in favor of a widow on account of the loss of the society, comfort and protection of her husband exceeds that made on account of her pecuniary loss, the allowance will be deemed excessive. Florida Central & P. R. Co. v. Foxworth, 41 Fla. 1, 34 So. Rep. 270.

wealth and property had he continued to live, and the reasonable expectation which the widow had of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs.[1] The amount of his probable accumulations would depend on his age, occupation, habits, bodily health and ability.[2] A wife has a right to support during her life out of her husband's estate.[3] She partakes of the benefits of his affluence while they both live, and if she survive her share of the estate is always augmented by its increase. So long as the legal relation of husband and wife exists, without reference to the will of the husband, the wife not having forfeited her right as such by her own wrong, she is entitled to support from him in accordance with her station in life.[4] Hence, the damages to

[1] Lawson v. Chicago, etc. R. Co., 64 Wis. 448, 54 Am. Rep. 634, 24 N. W. Rep. 618; Castello v. Landwehr, 28 Wis. 522; Annas v. Milwaukee, etc. R. Co., 67 id. 48, 58 Am. Rep. 848, 30 N. W. Rep. 282; Kaspari v. Marsh, 74 Wis. 563, 43 N. W. Rep. 368; Harrison v. Sutter Street R. Co., 116 Cal. 156, 168, 47 Pac. Rep. 1079; Florida Central & P. R. Co. v. Foxworth, 41 Fla. 1, 76, 34 So. Rep. 270; Chicago & A. R. Co. v. Kelly, 182 Ill. 267, 272, 54 N. E. Rep. 979, 80 Ill. App. 675; Gulf, etc. R. Co. v. Johnson, 1 Tex. Civ. App. 103, 20 S. W. Rep. 1123; Rudiger v. Chicago, etc. R. Co., 101 Wis. 292, 302, 77 N. W. Rep. 169; Bauer v. Richter, 103 Wis. 412, 420, 79 N. W. Rep. 404. *Contra*, Baltimore & P. R. Co. v. Golway, 6 D. C. App. Cas. 142, 178, and see cases cited *infra*, this section.

Under a statute making the gross value of a husband's life the measure of his widow's recovery, regardless of whether she had, previous to his death, received anything from him or not, and without regard to what his personal expenses may have been, the more prosperous condition of his family after his death is irrelevant. Boswell v. Barnhart, 96 Ga. 521, 23 S. E. Rep. 414.

[2] Kansas Pacific R. Co. v. Lundin, 3 Colo. 94; Holmes v. Oregon, etc. R. Co., 6 Sawyer, 262; Au v. New York, etc. R. Co., 29 Fed. Rep. 72; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103, 9 N. W. Rep. 575; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Moranda, 93 id. 302, 34 Am. Rep. 168; Roose v. Perkins, 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. Rep. 715; Taylor v. Western Pacific R. Co., 45 Cal. 323; McIntyre v. New York Central R. Co., 37 N. Y. 287; Catawissa R. Co. v. Armstrong, 52 Pa. 282; Mansfield, etc. Co. v. McEnery, 91 id. 185, 36 Am. Rep. 662; Kesler v. Smith, 66 N. C. 154; Burton v. Wilmington, etc. R. Co., 82 id. 504; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Central R. Co. v. Thompson, 76 Ga. 770; Baltimore, etc. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575; Ohio, etc. R. Co. v. Voight, 122 Ind. 288, 23 N. E. Rep. 774; Railway Co. v. Sweet, 60 Ark. 550, 31 S. W. Rep. 571; Belting v. Hobbett, 142 Ill. 72, 30 N. E. Rep. 1048.

[3] Bish. Marr. Women, §§ 57, 58, 892.

[4] Florida Central & P. R. Co. v. Foxworth, 41 Fla. 1, 76, 34 So. Rep. 270; Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 357, 377, 37 N. E. Rep. 150.

which she is entitled are not affected by the facts that her husband may have left her a year or more before his death and had no communication with her in the meantime, and intended never to return to her or contribute to her support.[1] But it is otherwise if, during his life-time, the wife may have lost her legal right to support by living in adultery.[2] There may be added to the foregoing elements of damage the value of the services of a deceased husband and father in the superintendence, attention to, and care of his family, and the education of his children.[3] But it is otherwise, in an action brought for the benefit of the widow and next of kin, as to the funeral expenses,[4] and the cost of nursing, medical attention, etc.[5]

Life tables (though they are not essential)[6] if they approximately show the expectancy of life of persons of the age of him whose rights are involved or upon whose expectancy of life such rights depend[7] may be used to ascertain the gross amount of the value of life;[8] but such amount must be reduced to its present value; in other words, where the value of the life, less the personal expenses of the deceased, is the measure of damages the sum awarded must not exceed the amount which would be realized each year during the estimated continuance of life by his net earnings.[9] In considering the

[1] Dallas & W. R. Co. v. Spicker, 61 Tex. 427, 48 Am. Rep. 297; Central of Georgia R. Co. v. Bond, 111 Ga. 13, 36 S. E. Rep. 299.

[2] Stimpson v. Wood, 57 L. J. (Q. B.) 484, 59 L. T. Rep. 218, 36 Week. Rep. 734.

[3] Railway Co. v. Sweet, 57 Ark. 287, 295, 21 S. W. Rep. 587.

[4] Maney v. Chicago, etc. R. Co., 49 Ill. App. 105, 113.

[5] Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Same v. Waade, 54 Ill. App. 215, 226.

[6] Boswell v. Barnhart, 96 Ga. 521, 524, 23 S. E. Rep. 414.

"The jury may make their estimate from the age, health, habits and the physical condition of the person at the time of his death." Atchison, etc. R. Co. v. Hughes, 55 Kan. 491, 503, 40 Pac. Rep. 919.

[7] Pearl v. Omaha, etc. R. Co., 115 Iowa, 535, 88 N. W. Rep. 1078; Decker v. McSorley, 111 Wis. 91, 86 N. W. Rep. 554.

[8] Harrison v. Sutter Street R. Co., 116 Cal. 156, 168, 47 Pac. Rep. 1079; Belting v. Hobbett, 142 Ill. 72, 30 N. E. Rep. 1048; § 455.

The jury may find that the duration of a particular life would have been much longer and that the earning capacity of the deceased would have extended over a greater period than the tables show. Sternfels v. Metropolitan Street R. Co., 73 App. Div. 494, 77 N. Y. Supp. 309.

[9] Atlantic, etc. R. Co. v. Newton, 85 Ga. 517, 11 S. E. Rep. 776; Rowley v. London, etc. R. Co., L. R. 8 Ex. 221; Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 356, 378, 37 N. E. Rep. 150; McAdory v. Louisville & N. R. Co.,

personal expenses of the deceased the amount he was expending for the education and maintenance of a young brother and money saved for the purpose of investing in land from month to month are not to be deducted from his gross earnings.[1] In estimating the accumulations the deceased would probably have made income derived from property, investments or the employment of capital is to be disregarded,[2] and the jury should be instructed to consider that the deceased in his declining years might experience diminished capacity to labor and earn money.[3] Where the testimony was to the effect that the deceased spent all his earnings on himself and his wife the court assumed that one-half thereof was used for her benefit, and that at the end of his expectancy of life nothing would have been saved. The measure of the wife's recovery was such sum as, being put to interest, will each year, by taking a part of the principal and adding it to the interest, yield one-half the sum of the earnings of the deceased.[4] If there is reasonable expectation that the widow would receive something from the surplus earnings of the husband, an allowance should be made therefor.[5] But this hard-and-fast rule is not everywhere approved. It is said by an able judge in a recent case that it was undoubtedly proper for the jury to consider under the evidence what amount of money invested in an annuity would yield the yearly amount the widow and next of kin would probably have received from the deceased had he lived, but they were not bound to allow damages based upon that method, nor any particular method of investment of money. It would be proper for a jury, upon proper evidence, to consider what amount invested in government bonds, well-secured mortgages

94 Ala. 272, 10 So. Rep. 507; Houston, etc. R. Co. v. Cowser, 57 Tex. 293; Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 21 So. Rep. 507, 62 Am. St. 121.

"Necessary injury" in the Missouri statutes means necessary pecuniary damage. The whole of the husband's probable earnings is not the measure of his widow's recovery; that is to be measured by the value of his support and maintenance. Knight v. Sadtler Lead & Zinc Co., 75 Mo. App. 541.

[1] Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 458, 22 So. Rep. 20.

[2] McAdory v. Louisville & N. R. Co., 94 Ala. 272, 10 So. Rep. 507.

[3] Western & A. R. Co. v. Moore, 94 Ga. 457, 20 S. E. Rep. 640.

[4] Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 9 So. Rep. 870; Decatur Car Wheel & Manuf. Co. v. Mehaffey, 128 Ala. 242, 256, 29 So. Rep. 646.

[5] Rudiger v. Chicago, etc. R. Co., 101 Wis. 292, 303, 77 N. W. Rep. 169.

on real estate, or any other safe security, would yield the annual amount the injured parties would probably have received from the deceased had he lived; but it would not be the province of the court to direct them to allow an amount based upon any one of these methods of investment. Indeed, if, after considering all of the evidence, they found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss according to their own good sense and sound judgment.[1] It was also held that it was error to instruct the jury that if they believed the plaintiff's expectancy of life was greater than that of her husband they could add to the sum which would purchase such an annuity the present value of any property that she would probably have received as dower if the husband had not been killed. The earnings of the deceased had been used in support of his family. The court observed: Under this evidence so many chances and contingencies of life and death, of sickness and health, of accident and injury, of the birth and rearing of children, conditioned the lives and relations of this husband and wife that no court was authorized to instruct the jury that they must allow the widow one-third or one-half of the present value of the husband's probable future accumulations if they were of the opinion she would have outlived him if he had not been killed.

The number of children dependent upon a widow for support is a proper subject of proof in an action by her to recover for the death of her husband. Such evidence shows her loss. During the husband's life-time he was bound to support them; after his death that obligation, to the extent of her pecuniary ability, devolved upon their mother.[2] The ill-health of the

[1] Per Sanborn, C. J., in St. Louis, etc. R. Co. v. Needham, 52 Fed. Rep. 371, 3 C. C. A. 129, 146. See Harkins v. Pullman Palace Car Co., 52 Fed. Rep. 724; Baltimore & O. R. Co. v. Golway, 6 D. C. App. Cas. 143, 178.

[2] Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. Rep. 565; Louisville & N. R. Co. v. Banks, 132 Ala. 471, 31 So. Rep. 573; Coffeyville Mining & G. Co. v. Carter, 65 Kan. 565, 70 Pac. Rep. 635; Pool v. Southern Pacific Co., 7 Utah, 303, 310, 26 Pac. Rep. 654; Chilton v. Union Pacific R. Co., 8 Utah, 47, 29 Pac. Rep. 963; English v. Southern Pacific Co., 13 Utah, 407, 421, 45 Pac. Rep. 47, 57 Am. St. 772, 35 L. R. A. 155; Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 532, 21 So. Rep. 507, 62 Am. St. 121; Louisville & N. R. Co. v. Banks, 132 Ala. 471, 31 So. Rep. 573; Abbot v.

plaintiff may be shown.[1] Under the act of congress of 1885,[2] which provides that the creditors of the deceased shall not have any interest in the recovery, and that the damages shall be assessed with reference to the injury done to the widow and next of kin of the deceased person, it is proper to show that the latter were helpless young children, and that they and their mother depended for support entirely upon the father and husband. The injury done by taking his life was much greater to persons so situated than it would be to next of kin able to maintain themselves, and who had never depended, and had no right to depend, upon the deceased for their maintenance.[3] The widow's remarriage will not preclude her from maintaining the action[4] nor affect the amount she is entitled to recover;[5] nor will the fact that she married the deceased after he sustained the injury which resulted in his death, the statute giving the right of action to his "widow."[6]

Insurance received by a widow from a policy on her husband's life is not to be deducted from the damages assessed in her favor in an action to recover for his death,[7] nor a pension

McCadden, 81 Wis. 563, 51 N. W. Rep. 1079, 29 Am. St. 910; Felton v. Spiro, 78 Fed. Rep. 576, 24 C. C. A. 321; Hunt v. Conner, 26 Ind. App. 41, 52, 59 N. E. Rep. 50; Railroad v. Davis, 104 Tenn. 442, 452, 58 S. W. Rep. 296; Spiro v. Felton, 73 Fed. Rep. 91. *Contra*, Illinois Central R. Co. v. Ashline, 56 Ill. App. 475; but compare Chicago & A. R. Co. v. Pearson, 82 id. 605, 614; Chicago Edison Co. v. Moren, 86 id. 152.

[1] Coffeyville Mining & G. Co. v. Carter, *supra*.

[2] Ch. 126, 23 Stats. 307.

[3] Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 93, 15 Sup. Ct. Rep. 491.

[4] International, etc. R. Co. v. Kuehn, 70 Tex. 582, 35 Am. & Eng. R. Cas. 421, 8 S. W. Rep. 484.

[5] O. S. Richardson Fueling Co. v. Peters, 82 Ill. App. 508; Chicago, etc. R. Co. v. Lagerkrans, — Neb. —, 91 N. W. Rep. 358.

The Georgia code provides that "a widow, and if no widow, a child or children, may recover for the homicide of the husband or parent," and gives the right of survivorship to the children if the widow dies. A right of action in a widow does not die on her remarriage; and the fact that thereby she becomes the wife of a wealthy man does not lessen the amount which she is entitled to recover. Georgia R. & B. Co. v. Garr, 57 Ga. 277, 24 Am. Rep. 492. In Georgia the damages may be mitigated by proof of the deceased's contributory negligence. Atlantic, etc. R. Co. v. Newton, 85 Ga. 517, 11 S. E. Rep. 776.

[6] Gross v. Electric Traction Co., 180 Pa. 99, 36 Atl. Rep. 424.

[7] § 158; Galveston, etc. R. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. Rep. 135; Coulter v. Pine, 164 Pa. 543, 30 Atl. Rep. 490; Sherlock v. Alling, 44 Ind. 184, 199; Althorf v. Wolfe, 22 N. Y. 355; Terry v. Jewett, 17 Hun, 395; Harding v. Townshend, 43 Vt.

which she receives pursuant to law.[1] In England it has been said that the widow is benefited only by the accelerated receipt of the policy money, and that benefit, being represented by the interest on the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased.[2] But Lord Campbell charged the jury that the amount due on an accident policy should be deducted, and that with regard to the policies upon the life of the deceased, other than accident, if you allow any deduction (and I think you will probably consider that some deduction ought to be allowed), it will only be in respect, I should think, of the premiums that would be paid by the family, or which would have been paid by himself, if this fatal accident had not happened. I leave that, however, entirely in your hands.[3] The cases cited appear to establish the law of England as being that the defendant can mitigate the damages to the extent that pecuniary benefit results to the plaintiff from the death.[4] But there must be more than probability that such benefit will inure. It has been held by the court of appeal of New Zealand that neither the probability, at the time of the death, that a fund will be raised by public subscription for the benefit of the families of a number of men killed by an accident, nor the facts that since the death and before action brought a more or less definite trust of the fund has been created, under which those for whom the action is brought will, in all probability, participate (though at the discretion of the trustee), are fit subjects for the consideration of the jury in estimating the damages to be allowed to the family of a person killed.[5] And it has been decided in Arkansas that

536, 5 Am. Rep. 304; Stahler v. Philadelphia & R. R. Co., 199 Pa. 383, 49 Atl. Rep. 273; Western & A. R. v. Meigs, 74 Ga. 857; Clune v. Ristine, 94 Fed. Rep. 745, 36 C. C. A. 450; Lipscomb v. Houston, etc. R. Co., 95 Tex. 5, 64 S. W. Rep. 923.

The same rule has been applied where the deceased had accident insurance. Tyler Southeastern R. Co. v. Raspberry, 11 Tex. Civ. App. 185, 34 S. W. Rep. 794. But see San Antonio, etc. R. Co. v. Long, 87 Tex. 148, 27 S. W. Rep. 113, 47 Am. St. 87, as modified by Gulf, etc. R. Co. v. Younger, 90 Tex. 387, 391, 38 S. W. Rep. 1121.

[1] Geary v. Metropolitan Street R. Co., 73 App. Div. 441, 77 N. Y. Supp. 54.

[2] Grand Trunk R. Co. v. Jennings, L. R. 13 App. Cas. 800.

[3] Hicks v. Newport, etc. R. Co., 4 B. & S. 403, note.

[4] Bradburn v. Great Western R. Co., L. R. 10 Ex. 1, 3.

[5] Greymouth-Point Elizabeth R. &

a conditional provision made by government for the benefit of the widow and minor children of a deceased pensioner is not to be considered in mitigation of their damages.[1] Evidence of the defendant's generosity in taking up a collection for the benefit of the plaintiff and paying for medical and surgical assistance rendered the decedent should not be received.[2] Neither are the damages to be mitigated because the husband and father left an estate. "The contrary is true. If a man deserts his family, leaving nothing for their support, and has accumulated no property, these facts constitute evidence tending to show that very slight, if any, damage results to the family from his death. If, on the contrary, a man is of industrial and economical habits, of business sagacity, and has in the past supported his family and accumulated property, the natural presumption is that such habits will continue if his life be prolonged, and that the damage to his family by reason of his untimely death is enhanced by those very facts. The estate left to the family would presumably be not less productive in the hands of the husband and father himself had he lived, and its income would inure to the benefit of the family as much had he lived as after his death.[3] Evidence as to what the deceased would have done in any given case of business management is inadmissible because it does not afford a reliable basis for computing the damages.[4]

Though the statutes of the state under which the action is brought do not limit the amount of the recovery in the particular action, they have been sometimes given weight in fixing the damages where that is done by the court, as in admiralty suits.[5] But in other actions the court will not pay attention to such statutes if that of the jurisdiction is later in date than they and contains no limitation as to the amount of the recovery.[6]

§ 1266. Recovery by husband. The right of a husband to damages resulting from the death of his wife extends to all

C. Co. v. McIvor, 16 N. Z. L. R. 258.

[1] Railway Co. v. Maddry, 57 Ark. 306, 21 S. W. Rep. 472.

[2] Linden v. Anchor Mining Co., 20 Utah, 134, 143, 58 Pac. Rep. 355.

[3] Houston v. Gran, 38 Neb. 687, 57 N. W. Rep. 403. See § 1267.

[4] Karau v. Pease, 45 Ill. App. 382, 388.

[5] The Oceanic, 61 Fed. Rep. 338, 363.

[6] Redfield v. Oakland Consolidated Street R. Co., 110 Cal. 277, 42 Pac. Rep. 822.

elements of his loss which have a pecuniary value. He cannot recover damages of a sentimental character,[1] as for loss of her society or companionship,[2] nor for anything which cannot be measured by money and satisfied by a pecuniary recompense;[3] but the loss of household service accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother.[4] In Texas there may be recovery of the

[1] Davis v. Guarnieri, 45 Ohio St. 470, 482, 4 Am. St. 548, 15 N. E. Rep. 350; Bolinger v. St. Paul, etc. R. Co., 36 Minn. 418, 1 Am. St. 680, 31 N. W. Rep. 856; Chicago v. Major, 18 Ill. 349, 360, 68 Am. Dec. 553; Holton v. Daly, 106 Ill. 131, 138; Chicago, etc. R. Co. v. Morris, 26 id. 400; Gaither v. Kansas City, etc. R. Co., 27 Fed. Rep. 544; Little Rock, etc. R. Co. v. Barker, 39 Ark. 491; St. Louis, etc. R. Co. v. Freeman, 36 id. 41; Au v. New York, etc. R. Co., 29 Fed. Rep. 72; Demarest v. Little, 47 N. J. L. 28; Rains v. St. Louis, etc. R. Co., 71 Mo. 165, 36 Am. Rep. 459; Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582, 62 N. W. Rep. 993. See § 1263.

[2] Bolinger v. St. Paul, etc. R. Co., *supra;* Tilley v. Hudson River R. Co., 24 N. Y. 474; McIntyre v. New York Central R. Co., 37 id. 295; Telfer v. Northern R. Co., 30 N. J. L. 188; Etherington v. Prospect Park, etc. R. Co., 88 N. Y. 641; Board of Com'rs v. Legg, 93 Ind. 523, 47 Am. Rep. 390; International, etc. R. Co. v. Boykin, 74 S. W. Rep. 93 (Tex. Ct. of Civ. App.).

A recovery by the husband as personal representative for the death of his wife bars an action by him as husband to recover for the loss of her society from the time of her injury until her death. Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 S. W. Rep. 236, 56 Am. St. 385.

There cannot be joined with an action for the death one for the physical and mental suffering of the deceased during the period between the accident and the death. Owensboro & N. R. Co. v. Barclay's Adm'r, 102 Ky. 16, 43 S. W. Rep. 177.

[3] Telfer v. Northern R. Co., *supra.*

Under a statute of Virginia in an action by a husband for the death of his wife testimony is properly received to show that she was loving, tender, dutiful, thrifty, industrious, economical and prudent. These qualities constitute an element of damages in fixing the *solatium* to be awarded to him. Simmons v. McConnell, 86 Va. 494, 10 S. E. Rep. 838.

[4] St. Lawrence, etc. R. Co. v. Lett, 11 Can. Sup. Ct. 422, 26 Am. & Eng. R. Cas. 454; Pennsylvania R. Co. v. Goodman, 62 Pa. 332; Board of Com'rs v. Legg, *supra;* Redfield v. Oakland Consolidated Street R. Co., 112 Cal. 220, 228, 43 Pac. Rep. 1117; Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582, 62 N. W. Rep. 993; May v. West Jersey, etc. R. Co., 62 N. J. L. 63, 42 Atl. Rep. 163.

In Delaware, etc. R. Co. v. Jones, 128 Pa. 308, 18 Atl. Rep. 330, the court held that the husband in a suit for the negligent killing of his wife sixty-six years of age, he having shown that the deceased had always been a healthy woman, was not bound to prove special damages, as if the subject of his loss had been a horse or other animal; and he was entitled to recover substantial damages for the pecuniary loss to him without making such proof.

expenses necessarily incurred by reason of the injuries sustained by a wife and which caused her death.[1] If the deceased had no descendants or next of kin and the husband would be entitled to the whole of her personal estate, evidence of the amount of the work, earnings and probable profits of the deceased is competent, whether the business in which she was engaged was hers individually, in which the husband had an expectant pecuniary interest, or whether it was his business in which she rendered services.[2]

The statute looks to prospective advantages of a pecuniary nature which have been cut off by the premature death; and the word "pecuniary" is used in distinction to those injuries to the affections and sentiments which arise from the death of relatives and which, though most fearful and grievous to be borne, cannot be measured or recompensed by money.[3] Evidence that the husband had married again and that his second wife performed like services and duties and contributed in like manner as the first to the support of the family and the accumulation of property is not admissible in mitigation of damages.[4] Nor is the fact that the life of the deceased was insured for the benefit of those in whose favor the action is brought.[5] If the jury may give such damages as they deem fair and just in reference to the pecuniary injury resulting to the plaintiff from the death, proof may be made of the husband's circumstances and financial condition.[6] Expediting the death of a patient by carelessness, inhuman and cruel treatment on the part of the attending physician is more than a mere technical injury, and cannot be compensated for by the imposition of nominal damages.[7]

§ 1267. Children's loss from death of parent. During minority children may ask compensation for such loss on the

[1] International, etc. R. Co. v. Boykin, 74 S. W. Rep. 93 (Ct. of Civ. App.).

[2] Meyer v. Hart, 23 App. Div. 131, 48 N. Y. Supp. 904.

[3] Tilley v. Hudson River R. Co., *supra.*

[4] Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. 548, 15 N. E. Rep. 350; Gulf, etc. R. Co. v. Younger, 90 Tex. 387, 38 S. W. Rep. 1121; Georgia R. & B. Co. v. Garr, 57 Ga. 277; Dimmey v. Wheeling & E. G. R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

[5] § 1265.

[6] Thoresen v. La Crosse City R. Co., 94 Wis. 129, 133, 68 N. W. Rep. 548, and local cases cited.

[7] Gray v. Little, 126 N. C. 385, 35 S. E. Rep. 611.

same principles, by the same measure and ascertained by proof of the same facts as a widow for the death of her husband. There is a legal right to support,[1] and a like expectancy of benefit from the distribution of the parent's estate. The jury is not confined in estimating the damage to any exact mathematical calculation, but is vested with considerable discretion, with which the courts will not interfere unless it has been abused.[2] The rights of minor children are not affected by what it may cost to raise or educate them, but are measured by the pecuniary benefit they could reasonably expect to receive from their father during the probable continuance of his life.[3] The law will imply a pecuniary loss in some amount to the wife and children by the death of the husband and father who was at the time employed and presumably receiving wages, and therefore able to discharge his obligation to support them.[4] Recovery may be had in behalf of a child *in ventre sa mere* if it is born within due time,[5] and on behalf of all the children of a deceased father who had a legal claim upon him for their support.[6] In an action by the next of kin to recover for the

[1] McPherson v. St. Louis, etc. R. Co., 97 Mo. 253, 259, 10 S. W. Rep. 846; Goss v. Missouri Pacific R. Co., 50 Mo. App. 614, 627.

[2] Stoher v. St. Louis, etc. R. Co., 91 Mo. 509, 4 S. W. Rep. 389; Countryman v. Fonda, etc. R. Co., 166 N. Y. 201, 59 N. E. Rep. 822; Douglass v. Northern Central R. Co., 59 App. Div. 470, 69 N. Y. Supp. 370; Rosenbaum v. Shaffner, 98 Tenn. 624, 40 S. W. Rep. 1086; Pool v. Southern Pacific Co., 7 Utah, 303, 311, 26 Pac. Rep. 654; White v. Australasian Steam Navigation Co., 13 N. S. W. L. R. (law) 177; St. Louis, etc. R. Co. v. McCain, 67 Ark. 377, 386, 55 S. W. Rep. 165; Redfield v. Oakland Consolidated Street R. Co., 110 Cal. 277, 42 Pac. Rep. 822; Baltimore & O. R. Co. v. Stanley, 54 Ill. App. 215; O'Fallon Coal Co. v. Laquet, 89 id. 13; Gulf, etc. R. Co. v. Delaney, 22 Tex. Civ. App. 427, 55 S. W. Rep. 538; Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 357, 378, 37 N. E. Rep. 150; Phalen v. Rochester R. Co., 31 App. Div. 448, 52 N. Y. Supp. 836.

[3] International, etc. R. Co. v. Kuehn, 2 Tex. Civ. App. 210, 21 S. W. Rep. 58.

[4] Louisville, etc. R. Co. v. Buck, 116 Ind. 566, 9 Am. St. 883, 19 N. E. Rep. 453, 2 L. R. A. 520; McKeigue v. Janesville, 68 Wis. 50, 31 N. W. Rep. 298; Houghkirk v. Delaware & H. Canal Co., 92 N. Y. 219, 44 Am. Rep. 370; Countryman v. Fonda, etc. R. Co., 166 N. Y. 201, 209, 59 N. E. Rep. 822; Hunt v. Conner, 26 Ind. App. 41, 50, 59 N. E. Rep. 50; Kelley v. Chicago, etc. R. Co., 50 Wis. 381, 7 N. W. Rep. 291; Chicago v. Scholten, 75 Ill. 468; Chicago & N. R. Co. v. Swett, 45 Ill. 197; St. Louis, etc. R. Co. v. Haist, — Ark. —, 72 S. W. Rep. 893.

[5] The George & Richard, L. R. 3 Ad. & Ecc. 466. See Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242.

[6] International, etc. R. Co. v. Culpepper, 19 Tex. Civ. App. 182, 46 S. W. Rep. 922, Gulf, etc. R. Co. v. De-

death of a person, a brother or sister of the deceased born soon after his death is an heir and a necessary party.[1]

Ordinarily children are expected to survive their parents and to inherit whatever property they leave undisposed of, and to transmit their own property to their children. The mere fact that the children are all of age at the time of the parent's death does not everywhere[2] preclude them from recovering for the loss of such pecuniary benefits as they had a reasonable expectation of securing from additional accumulations had he not been injured.[3] On the other hand, where damages are claimed by an adult son on account of his mother's death the jury is to consider the likelihood that she might require care and expense from him, and the amount of property owned by each as bearing upon the question of his loss.[4]

laney, 22 Tex. Civ. App. 427, 55 S. W. Rep. 538.

[1] Chicago & A. R. Co. v. Logue, 58 Ill. App. 142.

[2] In Pennsylvania if the deceased had not accumulated anything an expectation of inheritance by his children should not be considered. Wiest v. Electric Traction Co., 200 Pa. 148, 49 Atl. Rep. 891.

[3] Tuteur v. Chicago, etc. R. Co., 77 Wis. 505, 46 N. W. Rep. 897; Galveston, etc. R. Co. v. Puente, 70 S. W. Rep. 362 (Tex. Ct. of Civ. App.); Mansfield Coal & C. Co. v. McEnery, 91 Pa. 185, 36 Am. Rep. 662; Redfield v. Oakland Consolidated Street R. Co., 110 Cal. 277, 288, 42 Pac. Rep. 822; Chicago, etc. R. Co. v. Ptacek, 171 Ill. 9, 49 N. E. Rep. 191; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Phalen v. Rochester R. Co., 31 App. Div. 448, 52 N. Y. Supp. 836; Pennsylvania R. Co. v. Adams, 55 Pa. 499; Schnatz v. Philadelphia & R. R., 160 Pa. 602, 28 Atl. Rep. 952; Stahler v. Same, 199 Pa. 383, 49 Atl. Rep. 273; Tyler Southeastern R. Co. v. Raspberry, 13 Tex. Civ. App. 185, 34 S. W. Rep. 794.

It is otherwise under the terms of the dramshop acts or civil damage laws of some states, the injury in person or property therein mentioned being such as is in violation of a legal right of which the plaintiff was in the actual enjoyment before and at the time of the injury thereto. Jury v. Ogden, 56 Ill. App. 100; Goode v. Towns, 56 Vt. 410, 48 Am. Rep. 799.

In Phalen v. Rochester R. Co., *supra*, the deceased was aged sixty-eight at the time of her death, and was living around among her children, some of whom afforded her pecuniary assistance. The court observed: The fact that they had dutifully done so does not detract from their right to recover damages in this action. It might well be that when sickness or misfortune should render the care or assistance of this mother necessary, she would be in a condition to render it, and this would certainly be a pecuniary benefit. But we will not indulge in anticipations of the many ways in which the jury might see how the deceased could render pecuniary aid to her sons and daughters. They had the right to that aid and to the preservation of her life as long as Providence should permit.

[4] Lazelle v. Newfane, 70 Vt. 440, 41 Atl. Rep. 511.

Evidence of the financial condition of the head of the family at the time of the death of the wife is admissible upon the issue of pecuniary injury sustained by a child. To the extent that the aid given by the mother to the child was derived from the income of property which the latter received at the mother's death, such aid was not lost by her death. But the fact of the receipt of property is not a defense to the child's action.[1] The last proposition is very satisfactorily dealt with in a late Pennsylvania case, which is in harmony with a recent Nebraska case elsewhere noted.[2] In the Pennsylvania case the fact that, as the result of the death of their father, adult children came into possession of an inheritance was held immaterial to the right or measure of recovery for his death. The question involved is similar to that which arises where the deceased had insurance on his life for the benefit of those who are entitled to recover for his death. As we have seen,[3] the courts in the United States are a unit in opposition to the idea that the wrong-doer's liability is thereby mitigated. On the question as to the effect of the inheritance upon the damages recoverable the court said: Conceding the right to recover if a loss is sustained, how do we ascertain what is a loss in the sense contemplated by the act? A son who is receiving nothing from his father living may be said to be pecuniarily benefited by the parent's death; but we have yet to learn that a railroad company by negligently causing death can in this way become the gratuitous and unsolicited benefactor of children who prefer their father living; and it is a novel proposition that a yearly allowance with a certainty of an inheritance of an estate constantly increasing in value by the parent's prudence and financial ability can be cut off by the killing of the parent, and the children be told that it is for their benefit. If that is the law, what security have the wealthy against the negligence of others? All inducements for the use of care and caution as to such are removed. The only reasons why a verdict in pure negligence cases can be justified are as an inducement appealing to self-interests to use care and caution;

[1] Gulf, etc. R. Co. v. Younger, 90 Tex. 387, 38 S. W. Rep. 1121, modifying San Antonio, etc. R. Co. v. Long, 87 Tex. 148, 27 S. W. Rep. 113, 47 Am. St. 87, 24 L. R. A. 637.

[2] § 1265.

[3] Id.

but these are taken away if we hold that no damages can be recovered by the children of wealthy people because they get the estate as a result of the unlawful act. As the jury were told, at request of defendant, that nothing could be allowed for the suffering of the deceased or the feelings of the surviving members of his family, and if in addition we hold that nothing can be recovered for the reason now urged, the defendant, although confessedly guilty of negligence resulting in death, suffers no loss or punishment for its unlawful act, simply because of the financial standing of the deceased. If this is law it might be well for the legislature to provide a new criminal offense and substitute imprisonment for damages, and thus induce the same degree of care and caution in the transportation of the rich as of the poor. It is not, however, absolutely correct to say that the mere fact of coming into the inheritance presently is a benefit peculiarly, for *non constat* that if the life had been prolonged but a week or month that the estate would not have been larger. The true question is what had these plaintiffs the right to receive from the parent during his life, and for the loss of this they are to be compensated; what they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation. To say, "True it is we have taken from you his benefactions, but you get by law, not from us, but from his estate which we thus make available for you, something better," is to substitute the heirs' legal right under the law for the company's liability.[1]

It has been held that the jury may take into consideration the earnings of the deceased, and that the question whether the minor children had other means of support after his death is wholly immaterial.[2] In estimating the probable savings the deceased would have accumulated but for his death, the income received from his investments, if these go to his adult children, should not be considered because they are in the im-

[1] Stahler v. Philadelphia & R. R. Co., 199 Pa. 383, 49 Atl. Rep. 273, 85 Am. St. 791.

[2] Heyer v. Salsbury, 7 Ill. App. 93.

mediate enjoyment of such income.[1] The consideration of any prospective inheritance that might have been reasonably expected to be derived from the deceased has been considered too uncertain to be the basis of an award. Following the language of the supreme court of the United States[2] it has been held that the consideration of pecuniary benefits from the deceased must be limited to such as the next of kin had a reasonable expectation of receiving while he lived.[3] "The property, wealth, helplessness or dependence of the lineal next of kin is immaterial on the question of the amount of recovery."[4] Where the action must be brought for the benefit of the estate the number and ages of the family are not material, where the relation is lineal, as the sole measure of damages is the pecuniary loss — that is, how much would the deceased, in all probability, have added to the estate had he lived, which amount would not be affected by the number or ages of such kindred, as each would only get his proportionate share as provided by law for the distribution of the personal property of an intestate without being increased or diminished as to any one of them on account of poverty, age or physical condition.[5]

The damages may, in some states, include compensation for the loss of physical care and mental training, where the father was fitted to furnish such training, for this is among the most important of parental duties.[6] But it should be shown that

[1] Denver, etc. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. Rep. 211, citing Grand Trunk R. Co. v. Jennings, L. R. 13 App. Cas. 800; Pym v. Great Northern R. Co., 2 B. & S. 759, 4 id. 396.

[2] Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. Rep. 491.

[3] Baltimore & P. R. Co. v. Golway, 6 D. Ct. App. Cas. 143, 180.

[4] Chicago, etc. R. Co. v. Woolridge, 174 Ill. 330, 335, 51 N. E. Rep. 701; Fox v. Oakland Consolidated Street R. Co., 118 Cal. 55, 50 Pac. Rep. 25, 62 Am. St. 216.

[5] Chicago, etc. R. Co. v. Woolridge, 174 Ill. 330, 336, 51 N. E. Rep. 701; Bradley v. Ohio River R. Co., 122 N. C. 972, 30 S. E. Rep. 8.

[6] Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. Rep. 1109; Board of Com'rs v. Legg, 93 Ind. 523, 47 Am. Rep. 390; McIntyre v. New York Central R. Co., 37 N. Y. 287; Tilley v. Hudson River R. Co., 29 id. 252; Baltimore, etc. R. Co. v. Wightman. 29 Gratt. 431, 26 Am. Rep. 384; Illinois Central R. Co. v. Weldon, 52 Ill. 290; Galveston, etc. R. Co. v. Puente, 70 S. W. Rep. 362 (Tex. Ct. of Civ. App.); Redfield v. Oakland Consolidated Street R. Co., *supra;* Baltimore & O. R. Co. v. Stanley, 54 Ill. App. 215; McGowan v. St. Louis Ore & Steel Co., 109 Mo. 518, 533, 19 S. W. Rep. 199; Hoadley v. International Paper Co., 72 Vt. 79, 84, 47 Atl. Rep. 169; Hunt v. Conner, 26 Ind. App. 41, 50, 59 N. E. Rep. 50;

the father is capable of fulfilling this duty.[1] That is done by proof that he was a careful, painstaking, industrious, temperate and trustworthy man of good business qualifications.[2] Where the deceased was aged fifty-three years, and supported herself, as did her two adult children, the court said: It is for the jury to consider if the health of the daughter should fail whether the mother might not take her to her own home, nurse and care for her indefinitely. The same might be true of the son. In other words, they are permitted to consider in a reasonable way those prospective and indefinite damages arising from the death of a mother under these circumstances, in addition to the actual money damages as proved.[3] The compensation for loss of care and training should not extend beyond the period of the child's minority according to at least one court,[4] but the rule is not so limited in New York.[5] In Michigan and New Jersey a recovery for the loss of counsel and advice is confined to narrower limits than in most other states. It is said to be distinctly against the rule in the former state to allow the consideration of that element of damage on the ground that the jury might roam at large and draw upon their imagination as to the extent of the injury suffered.[6] Where the most that could be inferred was that the father rendered occasional as-

Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 357, 377, 37 N. E. Rep. 150; Gulf, etc. R. Co. v. Younger, 90 Tex. 387, 38 S. W. Rep. 1121; St. Louis, etc. R. Co. v. Haist, — Ark. —, 72 S. W. Rep. 893; Pool v. Southern Pacific Co., 7 Utah, 303, 310, 26 Pac. Rep. 654; Chilton v. Union Pacific R. Co., 8 Utah, 47, 29 Pac. Rep. 963; Sternfels v. Metropolitan Street R. Co., 73 App. Div. 494, 77 N. Y. Supp. 309. *Contra*, Bradley v. Ohio River & C. R. Co., 122 N. C. 972, 30 S. E. Rep. 8.

In Northern Pacific R. Co. v. Freeman, 83 Fed. Rep. 82, 27 C. C. A. 457, a charge that, in fixing the damages, the jury might regard the deceased's ability to earn money, to support, maintain, care for, and protect his wife and children, and to educate and train the latter, "and the loss to the wife and children because of being deprived of the use and comforts of his society, and the loss of his experience, knowledge and judgment in managing his and their affairs," etc., was not objectionable because allowing a recovery for sentimental damages; it covered a loss of society in the material and pecuniary sense only.

[1] Illinois Central R. Co. v. Weldon, 52 Ill. 290; Chicago, etc. R. Co. v. Austin, 69 Ill. 426.

[2] Railway Co. v. Sweet, 60 Ark. 550, 31 S. W. Rep. 571.

[3] Countryman v. Fonda, etc. R. Co., 166 N. Y. 201, 209, 59 N. E. Rep. 822.

[4] Baltimore & P. R. Co. v. Golway, 6 D. C. App. Cas. 143, 177.

[5] Tilley v. Hudson River R. Co., *supra*.

[6] Walker v. Lake Shore, etc. R. Co., 104 Mich. 606, 617, 62 N. W. Rep. 1032.

sistance to his children in their studies, such as a parent is supposed to render, but which, in its very nature, is as incapable of measurement by a pecuniary standard as is the loss of love, affection and sympathy, such assistance was not an element of the damage.[1] In New Jersey there cannot be a recovery because of the loss of the advice and counsel of the deceased unless it is shown that they would have been given concerning the pecuniary affairs of the next of kin and would probably have resulted in a pecuniary benefit, and that the loss of the advice and counsel will probably result in a pecuniary injury.[2] Adult sons cannot recover for the loss of such benefit as they derived from the credit, capital, skill and reputation of their father as a member of a partnership with them. "The injury thus resulting is not within the scope of the statute, which gives damages for injuries resulting from the severance of a relation of kinship, and not of contract."[3] If some of the children of the deceased are in poor health the fact may be shown, although others of them who are in good health may be benefited by the evidence.[4] In Michigan only children legally entitled to support can recover damages.[5]

§ 1268. Facts and circumstances to be considered in estimate of damages. These are the age, health, condition in life, occupation, habits of industry and sobriety, mental and physical capacity, disposition to frugality, opportunities and customary earnings of the deceased and his expectation of life.[6] While

[1] S. C., 111 Mich. 518, 69 N. W. Rep. 1114.

[2] May v. West Jersey & S. R. Co., 62 N. J. L. 63, 42 Atl. Rep. 163.

[3] Demarest v. Little, 47 N. J. L. 28.

[4] McKeigue v. Janesville, 68 Wis. 50, 31 N. W. Rep. 298; Hunt v. Conner, 26 Ind. App. 41, 55, 59 N. E. Rep. 50.

[5] Rouse v. Detroit Electric R., 128 Mich. 149, 87 N. W. Rep. 68.

[6] Railway Co. v. Sweet, 60 Ark. 550, 558, 31 S. W. Rep. 571, citing the text; Marschall v. Laughran, 47 Ill. App. 29; Wright v. Crawfordsville, 142 Ind. 636, 42 N. E. Rep. 227 (evidence of specific intoxications of deceased admissible); Wheelan v. Chicago, etc. R. Co., 85 Iowa, 167, 178, 52 N. W. Rep. 119; Lowe v. Same, 89 Iowa, 420, 56 N. W. Rep. 519; Spaulding v. Same, 98 Iowa, 205, 219, 62 N. W. Rep. 227; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 553, 8 So. Rep. 360; Same v. Graham's Adm'r, 98 Ky. 688, 34 S. W. Rep. 229 (applying the law of Alabama); Schaub v. Hannibal, etc. R. Co., 106 Mo. 74, 93, 16 S. W. Rep. 924; McGowan v. St. Louis Ore & Steel Co., 109 Mo. 518, 533, 19 S. W. Rep. 199; Anderson v. Chicago, etc. R. Co., 35 Neb. 95, 52 N. W. Rep. 840; Richmond & D. R. Co. v. Hammond, 93 Ala. 181, 9 So. Rep. 577; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Lustig v. Same, 65 Hun, 547, 20 N.

the earnings as proved are to be the chief guide to the jury they may determine from other facts in evidence whether his ability to earn money would have increased or decreased, and may fix the amount of their verdict in the light of the probability.[1] It is not improper to consider the decedent's fair prospects of promotion in his calling.[2] Evidence as to earnings is not necessarily confined to the sum being earned immediately before death; proof may be made of wages actually earned by an employee in a non-political position, for which he had demonstrated his fitness, which go to make up his average earnings within a reasonable period of time prior to his death.[3] Evidence as to the income of the deceased for a particular pe-

Y. Supp. 477; Coley v. Statesville, 121 N. C. 301, 307, 28 S. E. Rep. 482; Benton v. North Carolina R. Co., 122 N. C. 1007, 30 S. E. Rep. 333; Mendenhall v. Same, 123 N. C. 275, 31 S. E. Rep. 480; Carlson v. Oregon Short Line R. Co., 21 Ore. 450, 28 Pac. Rep. 497; McHugh v. Schlosser, 159 Pa. 480, 27 Atl. Rep. 291, 39 Am. St. 699; English v. Southern Pacific Co., 13 Utah, 407, 422, 45 Pac. Rep. 47, 57 Am. St. 772, 35 L. R. A. 155; Louisville, etc. R. Co. v. Clarke, 152 U. S. 230, 242, 14 Sup. Ct. 579; Hunt v. Kile, 98 Fed. Rep. 49, 38 C. C. A. 641, 646; Broughel v. Southern New England Telephone Co., 73 Conn. 614, 48 Atl. Rep. 751; Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 458, 20 So. 20; note, 48 Am. Dec. 639; Louisville, etc. R. Co. v. Stacker, 86 Tenn. 343, 353, 6 Am. St. 840, 6 S. W. Rep. 737; Holmes v. Oregon, etc. R. Co., 6 Sawyer, 262, 5 Fed. Rep. 75; Taylor v. Western Pacific R. Co., 45 Cal. 323; Macon, etc. R. Co. v. Johnson, 38 Ga. 409; Central R. Co. v. Thompson, 76 Ga. 770, 782; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Moranda, 93 id. 302; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280, 87 Am. Dec. 391; State v. Cecil County Com'rs, 54 Md. 426; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103, 9 N. W. Rep. 575; Roose v. Perkins, 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. Rep. 715; Telfer v. Northern R. Co., 30 N. J. L. 188; McIntyre v. New York Central R. Co., 37 N. Y. 287; Kesler v. Smith, 66 N. C. 154; Burton v. Wilmington, etc. R. Co., 82 id. 504; Catawissa R. Co. v. Armstrong, 52 Pa. 282; Mansfield Coal & C. Co. v. McEnery, 91 id. 185, 36 Am. Rep. 662; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Baltimore, etc. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Atchison, etc. R. Co. v. Wilson, 48 Fed. Rep. 57; Oakes v. Maine Central R. Co., 95 Me. 103, 49 Atl. Rep. 418; Pittsburgh, etc. R. Co. v. Parish, 28 Ind. App. 189, 62 N. E. Rep. 514; Standlee v. St. Louis, etc. R. Co., 25 Tex. Civ. App. 340, 60 S. W. Rep. 781; Coffeyville Mining & G. Co. v. Carter, 65 Kan. 565, 70 Pac. Rep. 635. See § 455, as to the value of life and annuity tables as evidence.

[1] Beecher v. Long Island R. Co., 53 App. Div. 324, 65 N. Y. Supp. 642.

[2] Douglass v. Northern Central R. Co., 59 App. Div. 470, 69 N. Y. Supp. 370; Geary v. Metropolitan Street R. Co., 73 App. Div. 441, 77 N. Y. Supp. 54.

[3] Central of Georgia R. v. Perkerson, 112 Ga. 923, 38 S. E. Rep. 365; Grimmelman v. Union Pacific R. Co., 101 Iowa, 74, 70 N. W. Rep. 90.

riod is proper; it tends, in connection with other evidence, to show the extent of the loss sustained.[1] If the deceased lived on his income, and his earning power is not proven, it is proper to consider his skill in the management of money, or his capacity to manage affairs so as to benefit an estate.[2] The customary earnings of the deceased are not to be shown by proof of the profits of a contracting partnership of which he was a member, and which employed several thousand dollars of capital,[3] especially if he did not give his personal attention to the firm business.[4] "The personal services of a skilled farmer are worth more than the mere manual labor he may perform. His judgment, skill and experience, gained by a long life of successful toil, should be also considered, and none are better qualified to give such an estimate than those who know him, and are themselves farmers of character and experience."[5] But it is not competent to show the minimum value of crops raised by a deceased farmer in any year or years.[6] It has been held that it is not essential to a recovery that evidence be offered of the pecuniary value of the services performed by the deceased or of the profits which he derived from his business, the other facts enumerated being shown, and, in addition, the age, sex, circumstances and condition in life of the next of kin.[7] But in the absence of proof showing the earning power or habits of industry of the deceased it is error to charge that the pecuniary loss may be estimated from his age, health and habits.[8] In Kentucky it is said to be the well settled doctrine that the single criterion by which to measure compensatory damages is the power of the deceased to earn money, inquiry as to the probable duration of his life being merely incidental.[9] Conceding the pertinency of the facts indicated the jury are not

[1] Louisville, etc. R. Co. v. Clarke, 152 U. S. 230, 242, 14 Sup. Ct. Rep. 579.

[2] Skottowe v. Oregon Short Line, etc. R. Co., 22 Ore. 430, 451, 30 Pac. Rep. 222, 16 L. R. A. 593.

[3] McCracken v. Traction Co., 201 Pa. 384, 50 Atl. Rep. 832.

[4] Read v. Brooklyn Heights R. Co., 32 App. Div. 503, 53 N. Y. Supp. 209. See § 1246.

[5] McLamb v. Wilmington & W. R. Co., 122 N. C. 862, 877, 29 S. E. Rep. 894.

[6] Railway Co. v. Howard, 90 Tenn. 144, 150, 19 S. W. Rep. 116.

[7] Missouri Pacific R. Co. v. Moffatt, 60 Kan. 113, 55 Pac. Rep. 837, 72 Am. St. 343.

[8] McHugh v. Schlosser, 159 Pa. 480, 28 Atl. Rep. 291.

[9] Louisville & N. R. Co. v. Berry's Adm'x, 96 Ky. 604, 29 S. W. Rep. 449.

bound to decide what the deceased would have earned during his expectancy of life and allow compensation measured by the loss of his earnings.[1] Proof of them, with the jurors' knowledge of his life expectancy, afford *data* for the computation of damages.[2]

The evidence of pecuniary injury need not be very strong in order that the case may go to the jury,[3] except as to damages made up of actual disbursements; these must be established by proper evidence.[4] Where the action was brought by a father for the death of an adult, but unmarried, son the testimony was to the effect that the former was fifty-nine years of age, nearly blind and was otherwise injured; he worked when he could; that some five or six years before the son's death he had assisted him pecuniarily, but had not done so since. It was held that there was evidence of pecuniary injury.[5] A reasonable probability of pecuniary benefit is all that is required.[6] A less liberal construction has been given the statute by the Irish court, which has held, in effect, that no injury is within its contemplation unless the deceased person has in fact rendered pecuniary assistance to the plaintiff.[7] And it has been ruled

[1] Railroad v. Spence, 93 Tenn. 173, 189, 23 S. W. Rep. 211, 42 Am. St. 907.

[2] Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 458, 22 So. Rep. 20; Chicago v. Hesing, 83 Ill. 204, 25 Am. Rep. 378; Ohio & M. R. Co. v. Wangelin, 152 Ill. 138, 38 N. E. Rep. 760; Toledo Street R. Co. v. Mammet, 13 Ohio Ct. Ct. 591.

[3] Lustig v. New York, etc. R. Co., 65 Hun, 547, 20 N. Y. Supp. 477.

[4] Countryman v. Fonda, etc. R. Co., 166 N. Y. 201, 208, 59 N. E. Rep. 822; Leeds v. Metropolitan Gas Light Co., 90 N. Y. 26.

[5] Hetherington v. Northeastern R. Co., 9 Q. B. Div. 160.

[6] Pym v. Great Northern R. Co., 4 B. & S. 406; Franklin v. Southeastern R. Co., 3 H. & N. 213; Dalton v. Same, 4 C. B. (N. S.) 296; McKay v. New England Dredging Co., 92 Me. 454, 43 Atl. Rep. 29.

"It is unnecessary where recovery is sought of the amount which deceased would have expended on dependents, had his expectancy of life not been disappointed, to prove more than that he had persons who would have been distributees, had he left an estate, dependent on him for support, and the amount he contributed to their support; and there is no legitimate occasion to show the ages of his minor children." Alabama Mineral R. Co. v. Jones, 121 Ala. 113, 119, 75 So. Rep. 814.

But it has been held in that state that if the only evidence relied upon to furnish *data* for ascertaining the damages is the statement by the widow of the deceased that at the time of his death we were saving $35 a month, there is not a sufficient basis to support a verdict for damages. Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 12 So. Rep. 176.

[7] Bourke v. Cork & M. R. Co., 4 L. R. Ire. 682; Holleran v. Bagnell, 6 id. 333.

in Kansas that in the absence of a legal obligation resting upon the deceased to contribute to the support of his kinspeople they can maintain an action only upon making proof that he had contributed to them in some way, or had recognized his family obligation to do so, and had manifested a disposition to discharge it.[1] The age of the deceased, the probability of his being able, in view of advancing years, to continue to pursue his occupation, are matters concerning which the jury must be instructed.[2] In considering them the jury must take into account the constitution, habits, heredity and such experience of the effect of age on muscle and nerve and endurance as they may have had themselves.[3] The mental and physical capacity of the deceased to earn money in his vocation may be proven, but the opinions of witnesses as to the amount he might earn in pursuits in which he had never engaged are not admissible.[4]

In Rowley v. London & N. R. Co., L. R. 8 Ex. 221, the mode of calculating damages under Lord Campbell's act was considered, the facts being that one of the persons who claimed compensation was the mother of the deceased, she being sixty-one at his death, and he forty. The mother held the son's personal covenant to allow her an annuity of 200*l.* a year during their joint lives. The jury were directed that they might allow her such a sum as would purchase such an annuity for a person of her age according to the average duration of human life. The elements for determining this sum were insurance tables showing such duration and a calculation of the value of such an annuity on government or other very good security. The majority of the court considered that the general rule of placing the injured party in the same pecuniary position as she would have occupied but for the casualty applied. An error was committed in calculating the annuity solely upon the probable duration of the mother's life, the contingency of the son dying before her being overlooked; and it was also error not to take into account the fact that the covenant was a personal one, and presumably of less value than a government obligation. The probable duration of the mother's life should have been calculated with reference to her health; but the facts concerning that ought to have been brought out by the party who would or might have been benefited by them. In the absence of anything showing the contrary, it was not error to direct the jury to consider the life as an average one, and to value it upon the basis of the tables.

[1] Atchison, etc. R. Co. v. Ryan, 62 Kan. 682, 64 Pac. Rep. 603.

[2] Central R. & B. Co. v. Roach, 64 Ga. 635; Georgia R. v. Pittman, 73 Ga. 325; Railway Co. v. Sweet, 60 Ark. 550, 558, 31 S. W. Rep. 571; Conley v. Maine Central R. Co., 95 Me. 149, 49 Atl. Rep. 668.

[3] Central R. v. Thompson, 76 Ga. 770.

[4] Atlantic, etc. R. Co. v. Newton, 85 Ga. 517, 11 S. E. Rep. 776; McLean v. Board of Land & Works, 7 Vict. L. R. (law) 239.

The existence of disease in the deceased which would probably have shortened his life is a proper matter of proof.[1] Where damages proportioned to the injury may be given, funeral expenses may be recovered.[2]

§ **1269. Same subject.** Under the code of Georgia the plaintiff, whether widow or child or children, may recover the full value of the life of the deceased.[3] This excludes the wants and condition of the family before the husband's death as well as thereafter as an element of damages and leaves for the consideration of the jury the age, habits, health, occupation, expectation of life, ability to labor, probable increase or diminution of that ability with the lapse of time, rate of wages, etc., and the necessary personal expenses of the deceased as the elements entering into the damages.[4] A subsequent statute, which is recognized as harsh, and is to be strictly construed,[5] excludes a deduction from the value of the life on account of the necessary or personal expenses of the deceased had he lived.[6] The question was raised, but not decided, in an earlier case whether the damages recoverable by a child for the death of its parent might be reduced by the amount which the child could earn before becoming of age. Jackson, C. J., said: It is true that a parent may make the child, when able, work, but that is the privilege of the parent. It does not follow that the defendant may set off that ability against the duty to support the child and thus lessen her recovery. How much could she work? When would she be able to work? Is she now healthy? Will she be so a year or five years hence? The field of conjecture is too wide and too far off — too remote to be set off against that support which is the child's measure of damages.[7] In an action by a child to recover for the loss of a parent the measure of damages has been held to be its support during

[1] Columbus & W. R. Co. v. Bridges, 86 Ala. 448, 5 So. Rep. 864; Schaidler v. Chicago & N. R. Co., 102 Wis. 564, 78 N. W. Rep. 732.

[2] Petrie v. Columbia & G. R. Co., 29 S. C. 303, 324, 7 S. E. Rep. 515.

[3] Act of 1878, p. 59; § 2971, Code of 1882.

[4] Central R. v. Rouse, 77 Ga. 393, 3 S. E. Rep. 307; Roswell v. Barnhart, 96 Ga. 521, 23 S. E. Rep. 414.

[5] Smith v. Hatcher, 102 Ga. 160, 29 S. E. Rep. 162; Southern Bell Telephone & Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. Rep. 881.

[6] Clay v. Central R. & B. Co., 84 Ga. 345, 10 S. E. Rep. 967.

[7] Atlanta, etc. R. v. Venable, 67 Ga. 697.

minority; the computation should begin from the parent's death, not from the date of the injury which caused it.[1] In estimating damages for the death of a man who is earning money the jury are not limited solely to the consideration of his age, life expectancy and earnings at the time of his decease. They may take into account the additional experience and skill which he might have acquired and a consequent increase of compensation.[2] The evidence concerning the earning capacity

[1] Id.; St. Louis, etc. R. Co. v. Johnston, 78 Tex. 536, 15 S. W. Rep. 104.

[2] Id.; I. & G. N. R. Co. v. Ormond, 64 Tex. 485; East Line, etc. R. Co. v. Smith, 65 id. 167; Geary v. Metropolitan Street R. Co., 73 App. Div. 441, 77 N. Y. Supp. 54. Compare Brown v. Chicago, etc. R. Co., 64 Iowa, 652, 21 N. W. Rep. 193.

In a recent case a man aged thirty-five years and earning $1.25 a day left a wife and two small children. His chief qualifications for earning money were that he was "stout, healthy and sober." The jury gave a verdict for $10,000 compensatory damages. In reply to an objection that the award was excessive the court observed: "If it was our duty to calculate from these facts the pecuniary value of his life to his wife and children at the date of his death we would not be able to make it reach near the sum given by the verdict. While the law does not, in this character of action, intend to give compensation for anything but pecuniary loss by estimating the money value of the life of the relative, and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, yet it must be admitted the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted for by the facts in evidence. Every parent and husband has, for his wife and children, a pecuniary value beyond the amount of his earnings by his labor or vocation. That value may to some but not to every extent be susceptible of allegation and proof, and to the extent that it can be alleged and proved it ought to be done. The difficulties of proof are known to the law-maker. In some states an attempt has been made to remove them by placing limits to the amount that may be recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law and no rule is prescribed for making the valuation upon facts incapable of exact ascertainment, we think that the law-maker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience and sense of justice should fix and assess the proper sum. They are expected to act uninfluenced by passion, prejudice or partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject. When it appears to the court that they have disregarded these requirements their verdict should be set aside. On the other hand, when the court is unable to determine that these things have not been observed by the jury, and when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions in the exercise of a power not pre-

of the deceased may cover a wide range of time and variety of pursuits.[1]

§ 1270. Same subject. The South Carolina statute provides that the "action shall be for the benefit of the wife, husband, parent and children of the person whose death shall have been caused, . . . and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate." Claims on behalf of adult children who were not living with their parents are not excluded, though such claims are not legal; the "injury" referred to is not restricted to the deprivation of a legal right.[2] The measure of damages

cisely defined, we think that the law intends that the jury's estimate rather than the equally undefined one of the judges shall prevail." Missouri Pacific R. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. Rep. 838. In St. Louis, etc. R. Co. v. Johnston, 78 Tex. 536, 15 S. W. Rep. 104, a verdict for $5,000 each in favor of a widow and a daughter seven years old was sustained; the deceased having been earning $125 per month.

The Texas statute gives an action for "actual damages" when death is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, . . . or by the unfitness, gross negligence or carelessness of their servants or agents; when it is caused by the wrongful act, negligence, unskilfulness or default of another; and in a separate section provides that when death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered. These provisions are construed to authorize exemplary damages only for the defendant's wilful act, omission or gross negligence; if the defendant is a corporation the act, omission or negligence must be attributable to one who represented it in its corporate capacity, as its officer, not of a mere ordinary servant or agent. Houston, etc. R. Co. v. Cowser, 57 Tex. 293; International, etc. R. Co. v. McDonald, 75 id. 41, 12 S. W. Rep. 860.

The retention in the defendant's service of the servant whose negligence has caused death is not sufficient to constitute a ratification of his act so as to authorize the imposition of exemplary damages. Id.

The right to exemplary damages is given by the constitution of Texas to a certain class of persons, and cannot be claimed by any others. Winnt v. International, etc. R. Co., 74 Tex. 32, 11 S. W. Rep. 907, 5 L. R. A. 172.

[1] Christian v. Columbus & R. R. Co., 90 Ga. 124, 15 S. E. Rep. 701.

[2] Petrie v. Columbia & G. R. Co., 29 S. C. 303, 7 S. E. Rep. 515.

is not the pecuniary loss or injury alone of the beneficiaries; the jury may give such damages as they think proportionate to the injury,[1] though no proof of damage is made in case of the death of an infant.[2] Punitive damages are not recoverable.[3]

§ 1271. Same subject. The Virginia statute authorizes the jury to award such damages as to it may seem fair and just. It is said to be remedial in its character and to be entitled to a liberal construction. Where nothing but compensation for pecuniary loss was claimed these rules were laid down: The damages were to be assessed with reference to the pecuniary loss sustained by the wife and children of the deceased. "First, by fixing them at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy and perseverance of the deceased during what would probably have been his life-time if he had not been killed. Second, by adding these to the value of his services in the superintendence, attention to and care of his family, of which they have been deprived by his death. As was very properly said in Tilley v. Hudson River R. Co.,[4] 'all these are elements of pecuniary success — component parts of that pecuniary capital of the continued exercise and employment of which the children were entitled to the benefits, and of which the wrongful act of the defendants deprived them.'"[5] Under that statute the jury are not restricted to the consideration of pecuniary loss; they may award punitive damages;[6] and, it seems, damages by way of solace and comfort to the family of the deceased.[7]

§ 1272. Recovery for death of child. Under the Georgia statute of 1887 a parent cannot recover for the death of a child

[1] Strother v. South Carolina & G. R., 47 S. C. 375, 25 S. E. Rep. 272.

[2] Mason v. Southern R., 58 S. C. 70, 37 S. E. Rep. 226.

[3] Garrick v. Florida Central & P. R., 53 S. C. 448, 31 S. E. Rep. 334, 69 Am. St. 874.

[4] 29 N. Y. 252.

[5] Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Gratt. 431, 26 Am. Rep. 384; Same v. Noell's Adm'r, 32 Gratt. 394.

[6] Matthews v. Warner's Adm'r, 29 Gratt. 570, 26 Am. Rep. 396.

[7] Baltimore & O. R. Co. v. Noell's Adm'r, 32 Gratt. 394. But see Norfolk & W. R. Co. v. Stevens' Adm'r, 97 Va. 631, 34 S. E. Rep. 525, 46 L. R. A. 367.

unless he or she "contributes to his or her support."[1] The dependence need not have been entirely upon the deceased.[2] There cannot be a recovery under that statute when the child whose death is sued for was so young that it was incapable of rendering service. In the case of a child aged one year and eight months the court will take judicial notice that it cannot render valuable services. In such a case the father may recover the expense reasonably and necessarily incurred in the burial of the child, including compensation for the loss of his own time for the purpose.[3] A father who is self-sustaining is not a "dependent" because he has assumed the support of others and is legally chargeable therewith, though his earnings are inadequate to support them in the manner in which their circumstances made it proper for them to live, and the deceased minor son contributed of his earnings to the support of his father and family.[4] In an action by the mother evidence of the father's physical disability to labor is admissible to show her partial dependence upon the deceased minor son. Where the parents and minor children all live together and are mutually dependent upon the family labors, a child of fifteen years, the proceeds of whose labor comes into the common stock, is to be regarded as contributing substantially to the mother's support.[5]

Under the Texas statute, which proportions the damages to the injury resulting from the death, it is not necessary that they be confined, in every case, to the time of the minority of the deceased child; they may or may not extend beyond that period.[6] In assessing damages more than ordinary discretion must be allowed the jury, yet, so far as possible, they should be aided by evidence. If in any case the damages may be estimated without evidence, it can only be done on the principle

[1] Clay v. Central R. & B. Co., 84 Ga. 345, 10 S. E. Rep. 967.

[2] Daniels v. Savannah, etc. R. Co., 86 Ga. 236, 12 S. E. Rep. 365.

[3] Southern R. Co. v. Covenia, 100 Ga. 46, 29 S. E. Rep. 219, 62 Am. St. 312, 40 L. R. A. 253.

[4] Georgia R. & B. Co. v. Spinks, 111 Ga. 571, 36 S. E. Rep. 855.

[5] Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. Rep. 406. As to what constitutes a "dependent" under the Florida statute, see Louisville & N. R. Co. v. Jones, 34 So. Rep. 246.

[6] Houston, etc. R. Co. v. Cowser, 57 Tex. 293; Texas & P. R. Co. v. Lester, 75 id. 56, 14 S. W. Rep. 20; McAdory v. Louisville & N. R. Co., 94 Ala. 272, 10 So. Rep. 507.

of necessity, as where the child is of tender years. It is suggested that, in other cases, the nearest approximation to the necessary reasonable certainty for estimating damages is such sum as would purchase an annuity equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances which can reasonably be adduced and including the probable duration of his life.[1] This measure is not, however, conclusive upon the jury if they find from the circumstances that an adult son might have increased his earnings or that his parents' needs might have become greater and that his disposition would have been to supply them.[2] But the contingency that an adult son might not continue to furnish a sum which would buy an annuity equal to the sum he had furnished must be considered in the light of the probabilities affecting his own health, employment and life.[3] In an action to recover for the death of a son aged twenty years it was ruled that whether or not a less sum than that to which his whole contributions would have amounted would compensate the plaintiffs for the loss of such contributions as he would have made them was for the jury, and it was error for the court to assume that the compensation must necessarily consist of a sum equal to such contributions.[4] In an action to recover for the death of an adult son the former's pecuniary condition may be shown for the purpose of establishing a reasonable expectation of financial aid from the deceased, but not to increase the amount of damages.[5] A more accurate statement of the rule is that any fact which tends to show the amount of the pecuniary loss to the

[1] Houston, etc. R. Co. v. Cowser, 57 Tex. 293.

[2] International, etc. R. Co. v. Kindred, 57 Tex. 491; Texas & P. R. Co. v. Lester, *supra*, sustaining a verdict of $4,200 in favor of a widow for the death of her only child, a son of twenty-six years, who contributed $200 a year to her support, she being fifty-one years of age. In another case the mother was sixty; the deceased son twenty-two; his earnings were from $60 to $65 per month, about one-half of which was given her. A verdict for $3,550 was held to be proper. Missouri Pacific R. Co. v. Henry, 75 Tex. 220, 12 S. W. Rep. 828.

[3] McKay v. New England Dredging Co., 92 Me. 454, 44 Atl. Rep. 614.

[4] Fort Worth & D. City R. Co. v. Morrison, 93 Tex. 527, 56 S. W. Rep. 745.

[5] International, etc. R. Co. v. Kindred, 57 Tex. 491; Houston, etc. R. Co. v. White, 23 Tex. Civ. App. 280, 56 S. W. Rep. 204; Citizens' R. Co. v. Washington, 24 Tex. Civ. App. 422, 58 S. W. Rep. 1042.

beneficiary is competent, whether it tends to increase or diminish the damages.[1] If an adult son voluntarily assumes the support of an aged parent who is unable to maintain himself, the latter is as much entitled to the protection of a civil damage statute as if the son had been compelled to perform the statutory duty of furnishing support.[2] A statement made by the deceased to his mother that he would support and take care of her during life is competent evidence to show her reasonable expectation of pecuniary aid from him.[3]

In the case of the death of a minor child the pecuniary benefit its parents had a reasonable expectation of receiving from him, had he lived, is the measure of damages; and, in addition thereto, the cost of medical aid and other like expenses necessarily incurred[4] were held recoverable, but those were not items of pecuniary injury resulting from the death.[5] Under the Texas statute "the jury may give such damages as they may think proportioned to the injury resulting from" the death. In an action to recover for the death of a child of six years the court say: "First, where the killing of the child was wrongful, etc., the parents are entitled to at least nominal damages. Second, where the testimony shows the bodily health and strength, the sprightliness, or want of it, of mind; the aptitude and willingness to be useful in performing services, the mode such faculties are exercised, as in useful labor or otherwise; and when, from the age and undeveloped state of the child, any estimate of the value of the services until majority would be matter of opinion in which no par-

[1] Pressman v. Mooney, 5 App. Div. 121, 39 N. Y. Supp. 44; Thompson v. Johnston Bros. Co., 86 Wis. 576, 586, 57 N. W. Rep. 898; Elwood v. Addison, 26 Ind. App. 28, 35, 59 N. E. Rep. 47; Cincinnati Street R. Co. v. Altemeier, 60 Ohio St. 10, 18, and cases cited.

Where it was shown that the father had received financial aid from a minor son, it was proper to show that the deceased was survived by his mother and brothers and sisters. South Omaha Water Works Co. v. Vocasek, 62 Neb. 710, 87 N. W. Rep. 536. See Terhune v. J. W. Cody Contracting Co., 72 App. Div. 1, 76 N. Y. Supp. 255.

[2] De Puy v. Cook, 90 Hun, 43, 35 N. Y. Supp. 632.

[3] Houston, etc. R. Co. v. White, 23 Tex. Civ. App. 280, 56 S. W. Rep. 204; Bright v. Barnett & Record Co., 88 Wis. 299, 60 N. W. Rep. 418, 26 L. R. A. 524.

[4] Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519; Brunswig v. White, 70 Tex. 504, 8 S. W. Rep. 85. *Contra*, § 1278.

[5] See Murray v. Usher, 117 N. Y. 542, 23 N. E. Rep. 564.

ticular or especial knowledge in the way of expert testimony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value, then, upon such testimony, the sound discretion of the jury can be relied on to determine the value without any witness naming a sum. Third, as the age of the child increases and his faculties develop, testimony to actual services can and should be produced, giving a wider basis of induction to the jury in calculating the damage from the loss. Fourth, the circumstances of the parents suing, as in this case, often become necessary as evidence; not as a basis for increasing or diminishing the amount, but to illustrate the acts of the child as useful or otherwise. In this case the parents kept a dairy; all the family worked. The child, by attending to some duties, relieved the mother so that she could engage in other necessary labor."[1] The character of a minor child for industry, economy and sobriety and his devotion to his parents may be considered in determining the pecuniary benefit they would have derived from him;[2] as may his aptitude for a special calling.[3]

In Colorado the father and mother of a deceased child may join in a suit to recover for its death. Their failure to do so does not prejudice the defendant, affect the elements of damage, the measure of recovery, nor justify a second suit.[4] The right of the father to recover burial expenses is not affected because his wife was improperly joined in the action to recover for the death of the son.[5] Such expenses are not recoverable under a statute using the words the "pecuniary advantage which would have resulted by a continuance of the life of the deceased."[6] It has been held proper in an action to recover for the death of a girl aged eight years to show that her stepfather was a school teacher and the compensation paid women teachers in the vicinity where the deceased resided; there was

[1] Brunswig v. White, *supra*.

[2] Missouri Pacific R. Co. v. Lee, 70 Tex. 496, 7 S. W. Rep. 857; Pierce v. Conners, 20 Colo. 178, 37 Pac. Rep. 721.

[3] Snyder v. Lake Shore, etc. R. Co., — Mich. —, 91 N. W. Rep. 643.

[4] Pierce v. Conners, 20 Colo. 178, 37 Pac. Rep. 721, 46 Am. St. 279.

[5] Missouri, etc. R. Co. v. Evans, 16 Tex. Civ. App. 68, 41 S. W. Rep. 80.

[6] Consolidated Traction Co. v. Hone, 60 N. J. L. 444, 38 Atl. Rep. 759; Dalton v. Southeastern R. Co., 4 C. B. (N. S.) 296.

no presumption that the child would follow the employment of her mother — that of housewife.[1]

§ 1273. Same subject. The principal element of damage to a parent as the result of the death of a child is the loss of its services during minority, considering the cost of support and maintenance during the helpless part of its life.[2] The recovery must be limited to the actual pecuniary injury.[3] In some states the burial and other expenses incurred by reason of the child's death or sickness are recoverable.[4] In Louisiana if the death of a child is caused by drowning the expense of recovering the body is an element of damage, as is the loss of services and filial offices; the amount which the deceased might have recovered at the moment of death may also be recovered.[5] The right to recover for the loss of a minor son's services is not affected by a probability that, had the son lived, the parent might have given him his time or allowed him to spend it in idleness;[6] nor is the measure of recovery affected because the parent would receive a sum of money from the relief department of the employer of the deceased.[7] Under the statutes of Nebraska a father who has deserted his family and has not communicated with them for years or furnished them any legal support has no claim upon them for their earnings, and cannot recover for the death of one of them.[8]

In several states the damages for the death of a child have

[1] Eginorie v. Union County, 112 Iowa, 558, 84 N. W. Rep. 758.

[2] Morgan v. Southern Pacific Co., 95 Cal. 510, 30 Pac. Rep. 603, 20 Am. St. 143, 17 L. R. A. 71; Southern R. Co. v. Covenia, 100 Ga. 46, 29 S. E. Rep. 219, 62 Am. St. 312, 40 L. R. A. 253; Hopkinson v. Knapp, 92 Iowa, 328, 60 N. W. Rep. 620; Leahy v. Davis, 121 Mo. 227, 233, 25 S. W. Rep. 941; Schaffer v. Baker Transfer Co., 29 App. Div. 459, 51 N. Y. Supp. 1092; Fort Worth & D. City R. Co. v. Hyatt, 12 Tex. Civ. App. 435, 34 S. W. Rep. 677; Elwood v. Addison, 26 Ind. App. 28, 35, 59 N. E. Rep. 47.

[3] Id.; Pepper v. Southern Pacific Co., 105 Cal. 389, 38 Pac. Rep. 974; Lange v. Schoettler, 115 Cal. 388, 47 Pac. Rep. 139; Wales v. Pacific Electric Motor Co., 130 Cal. 521, 62 Pac. Rep. 932; Pierce v. Conners, 20 Colo. 178, 37 Pac. Rep. 721, 46 Am. St. 279; Diebold v. Sharp, 19 Ind. App. 474, 49 N. E. Rep. 837; Decker v. McSorley, 111 Wis. 91, 86 N. W. Rep. 554.

[4] Leahy v. Davis, 121 Mo. 227, 233, 25 S. W. Rep. 941.

[5] Le Blanc v. Sweet, 107 La. 355, 31 So. Rep. 766.

[6] Luessen v. Oshkosh Electric Light & Power Co., 109 Wis. 94, 85 N. W. Rep. 124.

[7] Boulden v. Pennsylvania R. Co., — Pa. —, 54 Atl. Rep. 906.

[8] Thompson v. Chicago, etc. R. Co., 104 Fed. Rep. 845.

been limited to the pecuniary benefits the parent had a legal right to claim from the child's services, and therefore the courts have confined the estimate to the period of minority.[1] An adult child is under no legal obligation to support his parents, and it is not to be presumed that they would have survived him, and that he would have remained unmarried. Hence, they are not entitled to recover a sum equal to that he might have earned had his life not been cut short.[2] Where the deceased was married and contributed her personal earnings to the support of her mother and the latter's young children, these considerations were material in ascertaining the recovery: that she might bear children; was under no legal obligation to support her next of kin; that her husband might require her services; that her infant brother and sister would, in a few years, be able to support their mother.[3] It has been observed in a recent case, the deceased having attained his majority, that it is doubtful whether the jury should consider at all as an element of damage the parent's loss of his comfort, society and protection. The right of the deceased to change his residence renders the consideration of that consequence too remote.[4] If the damages recovered are required to be distributed as if the deceased had died intestate, leaving personalty, the fact that some of the plaintiffs can recover only nominal damages, because of their lack of pecuniary interest in the life of the deceased, does not justify an increase of the award above the actual loss in order that the parent may receive such sum as the jury think proper.[5]

The restriction of the recovery to the pecuniary benefit the parent had a legal right to from the deceased, though strictly

[1] State v. Baltimore, etc. R. Co., 24 Md. 84, 107, 87 Am. Dec. 600; Agricultural, etc. Ass'n v. State, 71 Md. 86, 17 Am. St. 507, 18 Atl. Rep. 37; Hurst v. Detroit City R. Co., 84 Mich. 539, 48 N. W. Rep. 44; Cooper v. Lake Shore, etc. R. Co., 66 Mich. 261, 33 N. W. Rep. 306, 11 Am. St. 482; Pennsylvania Co. v. Lilly, 73 Ind. 252; Chicago v. Scholten, 75 Ill. 468; Rockford, etc. R. Co. v. Delaney, 82 id. 198, 25 Am. Rep. 308; Caldwell v. Brown, 53 Pa. 453; Mobile & O. R. Co. v. Watty, 69 Miss. 145, 12 So. Rep. 558; Leahy v. Davis, 121 Mo. 227, 25 S. W. Rep. 941; Schnable v. Providence Public Market, — R. I. —, 53 Atl. Rep. 634.

[2] Louisville, etc. R. Co. v. Wright, 134 Ind. 509, 34 N. E. Rep. 314.

[3] Commercial Club v. Hilliker, 20 Ind. App. 239, 50 N. E. Rep. 578.

[4] Pepper v. Southern Pacific Co., 105 Cal. 389, 38 Pac. Rep. 974.

[5] Faulkenau v. Rowland, 70 Ill. App. 20.

accurate so far as legal right is concerned,[1] has not generally been given controlling force in actions for the recovery of pecuniary damages sustained by the next of kin to the deceased. The principle which usually governs is that the jury should calculate the damages in reference to a reasonable expectation of benefits as of right or otherwise from the continuance of the life.[2] Legal liability alone is not the test of the injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account.[3] It is not essential to the recovery of substantial damages by the father of a son aged twenty-eight that the latter had accumulated prop-

[1] Keenan v. Brooklyn City R. Co., 145 N. Y. 348, 40 N. E. Rep. 15.

[2] Chicago v. Keefe, 114 Ill. 222; Sieber v. Great Northern R. Co., 76 Minn. 269, 79 N. W. Rep. 95.

[3] Dalton v. Southeastern R. Co., 4 C. B. (N. S.) 296; Franklin v. Same, 3 H. & N. 211; Pym v. Great Northern R. Co., 2 B. & S. 759; Illinois Central R. Co. v. Crudup, 63 Miss. 291; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5, 46 N. W. Rep. 79; Shaber v. Same, 28 Minn. 103, 9 N. W. Rep. 575; Robel v. Chicago, etc. R. Co., 35 Minn. 84, 27 N. W. Rep. 305; Scheffler v. Minneapolis, etc. R. Co., 32 Minn. 518, 21 N. W. Rep. 711; Hall v. Galveston, etc. R. Co., 39 Fed. Rep. 18; Gunderson v. Northwestern Elevator Co., 47 Minn. 161, 49 N. W. Rep. 694; Paulmier v. Erie R. Co., 34 N. J. L. 151; Johnson v. Chicago, etc. R. Co., 64 Wis. 425, 25 N. W. Rep. 223; Tuteur v. Chicago, etc. R. Co., 77 Wis. 505, 46 N. W. Rep. 897; Schadewald v. Milwaukee, etc. R. Co., 55 Wis. 569, 13 N. W. Rep. 458; Lehigh Iron Co. v. Rupp, 100 Pa. 95; North Pennsylvania R. Co. v. Kirk, 90 id. 15; Pennsylvania R. Co. v. Adams, 55 id. 499; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. Rep. 108; Fordyce v. McCants, 51 Ark. 509, 14 Am. St. 69, 11 S. W. Rep. 694, 4 L. R. A. 296; St. Joseph, etc. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. Rep. 461; Walters v. Chicago, etc. R. Co., 36 Iowa, 458; Munro v. Pacific Coast Dredging & R. Co., 84 Cal. 515, 18 Am. St. 248, 24 Pac. Rep. 303; Pennsylvania Co. v. Lilly, 73 Ind. 252; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Illinois Central R. Co. v. Reardon, 157 Ill. 372, 41 N. E. Rep. 871; Baltimore & O. S. R. Co. v. Then, 159 Ill. 535, 42 N. E. Rep. 971; Chicago, etc. R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. Rep. 190; Atchison, etc. R. Co. v. Cross, 58 Kan. 424, 49 Pac. Rep. 599; Graham v. Consolidated Traction Co., 64 N. J. L. 10, 44 Atl. Rep. 964; Armour v. Czischki, 59 Ill. App. 17; Boyden v. Fitchburg R. Co., 70 Vt. 125, 39 Atl. Rep. 771; Thompson v. Johnston Bros. Co., 76 Wis. 576, 57 N. W. Rep. 298, 26 L. R. A. 524; Bright v. Barnett & Record Co., 88 Wis. 299, 60 N. W. Rep. 418; Texas & P. R. Co. v. Wilder, 35 C. C. A. 105, 92 Fed. Rep. 953, quoting the text; Houston City Street R. Co. v. Sciacca, 80 Tex. 350, 16 S. W. Rep. 31; Rombough v. Balch, 27 Ont. App. 32, 44; West Chicago Street R. Co. v. Dooley, 76 Ill. App. 424; Decker v. McSorley, 111 Wis. 91, 86 N. W. Rep. 554; Chicago, etc. R. Co. v. Beaver, 199 Ill. 34, 65 N. E. Rep. 144; Draper v. Tucker, — Neb. —, 95 N. W. Rep. 1026.

erty or given pecuniary aid to the former after attaining his majority, other facts being proved which justify the conclusion of substantial loss.[1] This element of damage must be limited to such pecuniary benefits as might be reasonably expected to have been received after the child attained his majority; it is error to extend it to such benefits as might be conferred.[2] The restricted view has been sanctioned in the case of a child of such tender years as to be unable to render service or afford any evidence of an intention to render pecuniary aid after its majority to its parents,[3] though it is disapproved where the minor is of such age as to be capable of indicating an intention to aid his parents after his majority.[4] In most of the cases dealing with this question no distinction is made on account of the age of the minors, the courts proceeding on the theory that the laws of nature will secure to parents assistance from their adult children in case the need therefor and the ability to meet the need exist.[5] Unless the financial condition of the parents is proven there should be no allowance for services after the minority of the infant.[6] The damage resulting to parents from the death of a son in consequence of the non-fulfilment of a contract on his part to support them is too remote to be an element of loss.[7] Where the only evidence of damage to the father consisted of the loss of the son's aid in carrying out a contract a recovery was denied.[8]

The probable life of the beneficiary is to be regarded in awarding damages as well as that of the deceased but for his untimely death.[9] But the absence of direct testimony on this

[1] Sieber v. Great Northern R. Co., 76 Minn. 269, 79 N. W. Rep. 95.

[2] Fort Worth & D. City R. Co. v. Hyatt, 12 Tex. Civ. App. 435, 34 S. W. Rep. 677.

[3] Little Rock, etc. R. Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44; St. Louis, etc. R. Co. v. Freeman, 36 Ark. 41.

[4] Railway Co. v. Davis, 55 Ark. 462, 18 S. W. Rep. 628.

[5] Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. Rep. 108.

[6] Potter v. Chicago & N. R. Co., 21 Wis. 372, 376, 94 Am. Dec. 548.

[7] Brink v. Wabash R. Co., 160 Mo. 87, 60 S. W. Rep. 1058; Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., 25 Conn. 262, 65 Am. Dec. 571.

[8] Sykes v. Northeastern R. Co., 44 L. J. (C. P.) 191, 32 L. T. 199, 23 Week. Rep. 483.

[9] Duval v. Hunt, 24 Fla. 85, 15 So. Rep. 876; Fordyce v. McCants, 51 Ark. 509, 11 S. W. Rep. 694, 14 Am. St. 69, 4 L. R. A. 296; Jackson v. Consolidated Traction Co., 59 N. J. L. 25, 35 Atl. Rep. 754; Carpenter v. Buffalo, etc. R. Co., 38 Hun, 120.

point may be supplied by other evidence, as where the parent is a witness and fully examined as to her circumstances in life, including the fact that she was the mother of four children.[1]

§ 1274. Same subject. Statutes which give the right to recover for the benefit of the next of kin permit the parents to recover for the death of adult children on the principle just stated. Why, therefore, when a minor is killed should the estimate of damages stop arbitrarily at majority? It is true that in the former case there may be evidence to support the expectation of benefit, and none in the latter except such as is afforded by the fact of relationship and the general experience. Where the deceased is a minor and leaves a parent entitled to his services the law presumes there has been a pecuniary loss for which compensation under the statute may be given.[2] In such cases the pecuniary loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation. No doubt the estimate of damages may be aided by proof of the personal characteristics of the deceased. Evidence of his mental and physical capacity to be of service to his parent, his past earnings, habits of industry and sobriety, where the deceased is old enough to have established a character, are all facts to be considered in calculating the pecuniary loss sustained;[3] as is the expense of the education

[1] Moskovitz v. Lighte, 68 Hun, 102, 22 N. Y. Supp. 732.

[2] See Graham v. Consolidated Traction Co., 62 N. J. L. 90, 40 Atl. Rep. 773.

Where the child was less than three years old the court refused to set aside a verdict for six cents. Silberstein v. Wm. Wicke Co., 29 Abb. N. C. 291, 22 N. Y. Supp. 170.

In Southern R. Co. v. Covenia, 100 Ga. 46, 29 S. E. Rep. 219, 62 Am. St. 312, 40 L. R. A. 253, judicial notice was taken of the fact that a child less than two years of age could not render service which could be valued in money.

In Atlanta Consolidated Street R. Co. v. Arnold, 100 Ga. 566, 28 S. E. Rep. 224, the same conclusion was arrived at as to a child less than three years old.

In Crawford v. Southern R. Co., 106 Ga. 870, 33 S. E. Rep. 826, it was ruled that it was for the jury to find whether a child of four and a half years could render valuable service to its father.

In The Oceanic, 61 Fed. Rep. 338, 364, the court allowed $1,000 to a mother for the death of a daughter four and one-half years old.

[3] Rockford, etc. R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308; Stafford v. Rubens, 115 Ill. 196, 3 N. E. Rep. 568; Birkett v. Knickerbocker Ice Co., 41 Hun, 404; Russell v. Sunbury, 37 Ohio St. 372, 41 Am. Rep. 523; Houghkirk v. Delaware, etc. Canal Co., 92 N. Y. 219, 44 Am. Rep. 370;

and maintenance of a minor.[1] The elements of pecuniary loss sustained by a father in the death of a minor son are the latter's probable earnings during his minority [2] over and above his support, clothing and education; the probability of his living and becoming of sufficient ability to support his father in case of his becoming aged, poor and unable to support himself, at least where liability for such support is imposed by statute if the son is of sufficient ability to furnish it, and the amount he would have brought to his next of kin while living, and their prospect of inheriting from him after his death.[3] When the circumstances of the case afford a safe standard by which the compensation in damages can be measured, such standard should be given to the jury by stating the reasonable limits within which these calculations should be confined; if such standard is disregarded the verdict will either be reduced or

Etherington v. Prospect Park, etc. R. Co., 88 N. Y. 641; Robel v. Chicago, etc. R. Co., 35 Minn. 84, 27 N. W. Rep. 305; Vicksburg v. McLain, 67 Miss. 4, 6 So. Rep. 774; Johnson v. Chicago, etc. R. Co., 64 Wis. 425, 25 N. W. Rep. 223; Cook v. Clay Street Hill R. Co., 60 Cal. 604; Munroe v. Pacific Coast Dredging & R. Co., 84 id. 515, 18 Am. St. 248, 24 Pac. Rep. 303; Schadewald v. Milwaukee, etc. R. Co., 55 Wis. 569, 13 N. W. Rep. 458; Paulmier v. Erie R. Co., 34 N. J. L. 151; Illinois Central R. Co. v. Crudup, 63 Miss. 291; Van Brunt v. Cincinnati, etc. R. Co., 78 Mich. 530, 44 N. W. Rep. 321; Scheffler v. Minneapolis, etc. R. Co., 32 Minn. 518, 21 N. W. Rep. 711; Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103, 9 N. W. Rep. 575; Hall v. Galveston, etc. R. Co., 39 Fed. Rep. 18; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5, 46 N. W. Rep. 79; Kansas Pacific R. Co. v. Lundin, 3 Colo 94; Pineo v. New York, etc. R. Co., 34 Hun, 80; Quinn v. Power, 29 id. 183; Bowles v. Rome, etc. R. Co., 46 id. 324; Johnson v. Missouri Pacific R. Co., 18 Neb. 690, 26 N. W. Rep. 347; Pierce v. Conners, 20 Colo. 178, 37 Pac. Rep. 721, 46 Am. St. 279; Mollie Gibson Consolidated Mining & M. Co. v. Sharp, 5 Colo. App. 321, 38 Pac. Rep. 850; Duval v. Hunt, 34 Fla. 85, 15 So. Rep. 876; Bradley v. Sattler, 156 Ill. 603, 41 N. E. Rep. 171; Chicago, etc. R. Co. v. Huston, 196 Ill. 480, 63 N. E. Rep. 1028; Callaway v. Spurgeon, 63 Ill. App. 571; West Chicago Street R. Co. v. Scanlan, 68 id. 626; New York, etc. R. Co. v. Mushbrush, 11 Ind. App. 192, 37 N. E. Rep. 954; Andrews v. Chicago, etc. R. Co., 86 Iowa, 677, 686, 53 N. W. Rep. 399; Atrops v. Costello, 8 Wash. 149, 35 Pac. Rep. 620; Luessen v. Oshkosh Electric Light & Power Co., 109 Wis. 94, 85 N. W. Rep. 124; Cincinnati Street R. Co. v. Altemeier, 60 Ohio St. 10, 18, 53 N. E. Rep. 300; Kellogg v. Albany & H. R. & P. Co., 72 App. Div. 321, 76 N. Y. Supp. 1018.

[1] Atrops v. Costello, 8 Wash. 149, 35 Pac. Rep. 620.

[2] Welch v. Maine Central R. Co., 86 Me. 552, 570, 30 Atl. Rep. 116.

[3] Keenan v. Brooklyn City R. Co., 145 N. Y. 348, 40 N. E. Rep. 15; Johnson v. Long Island R. Co., 80 Hun, 306, 30 N. Y. Supp. 318, affirmed without opinion, 144 N. Y. 719.

set aside.[1] Where no reliable standard can be laid down for the measurement of damages much must be left to the judgment of the jury and their finding will not be disturbed unless it is such as to show that it is the result of prejudice or passion.[2]

§ 1275. Same subject. In Ihl v. Forty-second Street, etc. R. Co.,[3] Rapallo, J., said: "It is within the province of the jury who had before them the parents, their position in life, the occupation of the father and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present and prospective, resulting to the next of kin. Except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years [three years and two months]; and to hold without such proof the plaintiff cannot recover would in effect render the statute nugatory in most cases of this description. It cannot be said as matter of law that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exclude any pecuniary advantage which the parent

[1] Jackson v. Consolidated Traction Co., 59 N. J. L. 25, 35 Atl. Rep. 754; Seeley v. New York Central & H. R. R. Co., 8 App. Div. 402, 40 N. Y. Supp. 866; Dinnihan v. Lake Ontario Beach Imp. Co., 8 App. Div. 509, 40 N. Y. Supp. 764; Graham v. Consolidated Traction Co., 64 N. J. L. 10, 44 Atl. Rep. 964; Rowe v. New York, etc. Tel. Co., 66 N. J. L. 19, 48 Atl. Rep. 523; Kellogg v. Albany & H. R. & P. Co., 72 App. Div. 321, 76 N. Y. Supp. 1018.

[2] Parsons v. Missouri Pacific R. Co., 94 Mo. 286, 6 S. W. Rep. 464; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Ohio & M. R. Co. v. Wangelin, 152 Ill. 138, 38 N. E. Rep. 760; Baltimore & O. S. R. Co. v. Then, 159 Ill. 535, 42 N. E. Rep. 971; Terre Haute & I. R. Co. v. Eggmann, 58 Ill. App. 21; Andrews v. Chicago, etc. R. Co., 86 Iowa, 677, 686, 53 N. W. Rep. 399; St. Louis, etc. R. Co. v. French, 56 Kan. 584, 44 Pac. Rep. 12; Atchison, etc. R. Co. v. Cross, 58 Kan. 424, 49 Pac. Rep. 599; Sieber v. Great Northern R. Co., 76 Minn. 269, 274, 79 N. W. Rep. 95; Leahy v. Davis, 121 Mo. 227, 25 S. W. Rep. 941; Post v. Olmsted, 47 Neb. 893, 66 N. W. Rep. 828; Reger v. Rochester R. Co., 2 App. Div. 5, 37 N. Y. Supp. 520; Werner v. Brooklyn E. R. Co., 11 App. Div. 86, 42 N. Y. Supp. 846; Purcell v. Lauer, 14 App. Div. 33, 43 N. Y. Supp. 988; Manufacturing Co. v. Morris, 105 Tenn. 654, 58 S. W. Rep. 651; Houston City Street R. Co. v. Sciacca, 80 Tex. 350, 16 S. W. Rep. 31; Cicero & P. Street R. Co. v. Boyd, 95 Ill. App. 510; Chicago & E. R. Co. v. Branyan, 10 Ind. App. 570, 586, 37 N. E. Rep. 190, citing the text; Kane v. Mitchell Transportation Co., 90 Hun, 65, 35 N. Y. Supp. 581, affirmed without opinion, 153 N. Y. 680.

[3] 47 N. Y. 321, 7 Am. Rep. 450.

could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject beyond the age and sex of the child, the circumstances and condition in life of the parents,[1] or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical and would not aid the jury in arriving at a conclusion. It has been held by this court in several similar cases that the statute does not limit the recovery to the actual pecuniary loss proved on the trial."[2] Damages should be no more and no less than the widow of the decedent and next of kin have suffered from his death. Where there is no dependent connection between them their poverty and his wealth should not be considered. But where as head of the family he is the family support, the jury are entitled to the fullest insight into the family circumstances, and in the absence of special instructions they are at liberty to use their best judgment in arriving at results.[3]

§ 1276. Damages recoverable by collateral kindred. The general principle which underlies all recoveries under the statutes applies with force and is especially emphasized in actions by collateral kindred, that the recovery extends to the value of the reasonable expectation of what they might have received from the deceased had he lived.[4] In Chicago & Alton R. Co.

[1] Ewen v. Chicago, etc. R. Co., 38 Wis. 625.

[2] Citing Oldfield v. New York, etc. R. Co., 14 N. Y. 310, 319; O'Mara v. Hudson River R. Co., 38 id. 445, 450. Grogan v. Broadway F. Co., 87 Mo. 321; Nagel v. Missouri Pacific R. Co., 75 id. 653, 42 Am. Rep. 418; Owen v. Brockschmidt, 54 Mo. 289, are to the same effect.

[3] Staal v. Grand Rapids, etc. R. Co., 57 Mich. 239; Serensen v. Northern Pacific R. Co., 45 Fed. Rep. 407; Gill v. Rochester, etc. R. Co., 37 Hun, 107; Phelps v. Winona, etc. R. Co., 37 Minn. 485, 5 Am. St. 867, 35 N. W. Rep. 273; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103, 9 N. W. Rep. 575; Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575.

In Lockwood v. New York, etc. R. Co., 98 N. Y. 526, Earl, J., said: "In but few cases arising under this act is the plaintiff able to show direct specific pecuniary loss suffered by the next of kin from the death, and generally the basis of the allowance of damages has to be found in proof of the character, qualities, capacity and condition of the deceased and in the age, circumstances and condition of the next of kin. The proof may be unsatisfactory and the damages may be quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can."

[4] Steel v. Kurtz, 28 Ohio St. 191; Davis v. Guarnieri, 45 id. 470, 481, 4

v. Shannon[1] the court said: "If the next of kin are collateral kindred of the deceased and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages[2] can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been pecuniary loss, for which compensation under the statute must be given."[3] This reasoning is correct if no benefit from the eventual distribution of the estate of the deceased, had he lived, is to be taken into account. Any such benefit depends on three contingencies: that he would have increased his estate, that he would not have made a will to disinherit the widow and next of kin, and that they would survive him.[4] These contingencies are so important as to preclude the recovery of more than nominal damages where the principal fact in favor of the plaintiff is his heirship to the decedent.[5] If the collateral kindred are minors the estimate of their damages must not extend beyond their majority.[6]

§ 1277. Damages to the deceased's estate. Under statutes like those of Oregon and some other states which authorize the recovery of such damages as result from the death to the estate of the decedent the damages assessed are confined to the pecuniary loss to the estate. If the decedent be a minor no loss on account of his earnings during minority can be taken into account for they would not belong to his estate.[7]

Am. St. 548, 15 N. E. Rep. 350; Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103, 9 N. W. Rep. 575; Phelps v. Winona, etc. R. Co., 37 Minn. 485, 5 Am. St. 867, 35 N. W. Rep. 273; Duval v. Hunt, 34 Fla. 85, 113, 15 So. Rep. 876; Burk v. Arcata & Mad River R. Co., 125 Cal. 364, 57 Pac. Rep. 1065, 73 Am. St. 52.

[1] 43 Ill. 346.

[2] See § 1264.

[3] Holton v. Daly, 106 Ill. 131, 138; Chicago v. Scholten, 75 id. 469; Chicago, etc. R. Co. v. Swett, 45 id. 197, 204.

[4] Railroad Co. v. Barron, 5 Wall. 96; Howard v. Delaware & H. Canal Co., 40 Fed. Rep. 195.

[5] Burk v. R. Co., *supra;* In re California Navigation & Imp. Co., 110 Fed. Rep. 670.

[6] Duval v. Hunt, *supra.*

[7] Putnam v. Southern Pacific Co., 21 Ore. 230, 27 Pac. Rep. 1033; Craft v. Northern Pacific R. Co., 25 Ore. 275, 285, 35 Pac. Rep. 250; Tutwiler Coal C. & I. Co. v. Enslen, 129 Ala. 336, 348, 30 So. Rep. 600; Morris v. Chicago, etc. R. Co., 26 Fed. Rep. 23. In the last case a married woman was also killed, and an action was

In such cases the age, health, habits of industry and sobriety and mental and physical skill of the deceased, so far as they affect his capacity for rendering useful service to others or acquiring property, must be considered.[1] The capacity of the deceased to earn money is not the sole consideration upon which the assessment of compensation is to be made; the test is such sum as will reasonably remunerate his estate for the destruction of his earning power in view of all the facts.[2] In Connecticut the damages recoverable are based on the injury to the deceased, and not on the loss to his wife and children.[3] The principal element of damage is the loss of earning capacity resulting to the deceased, and thus, in a sense to his estate. On this question, evidence as to his age and health is admissible.[4] The only element of damage where the recovery is for the benefit of the estate of the decedent is the value of his earning power.[5] It seems that living expenses are not to be deducted. "A court could not well enter into such an inquiry. It would at least involve an investigation of the condition in life of the decedent, and it seems to us embark the court upon a sea of speculation almost without limit."[6] In a later case the court said that, if the question were new, it would hold that there ought to be an instruction to consider the necessary and economical living expenses of the deceased had he not been killed; but as instructions not containing such language had been approved and under them the jury might consider such expenses,

brought to recover damages to her estate on account of her death. The right of the husband to her earnings was not mentioned as affecting the question of damages.

[1] Holmes v. Oregon, etc. R. Co., 6 Sawyer, 293, 5 Fed. Rep. 528; Andrews v. Chicago, etc. R. Co., 86 Iowa, 677, 53 N. W. Rep. 399; McGhee v. Willis, 134 Ala. 281, 32 So. Rep. 301; Louisville & N. R. Co. v. Millett's Adm'r, 20 Ky. L. Rep. 532, 46 S. W. Rep. 498; Carlson v. Oregon Short Line, etc. R. Co., 21 Ore. 450, 28 Pac. Rep. 497; Ladd v. Foster, 12 Sawyer, 547, 31 Fed. Rep. 827; Holland v. Brown, 13 Sawyer, 284, 35 Fed. Rep. 43; Tutwiler Coal, etc. Co. v. Enslen, *supra*.

[2] Louisville & N. R. Co. v. Eakin's Adm'r, 103 Ky. 465, 479, 45 S. W. Rep. 529, 46 id. 496, 47 id. 872; Smith's Adm'r v. Middleton, 23 Ky. L. Rep. 2010, 66 S. W. Rep. 388.

[3] McElligott v. Randolph, 61 Conn. 157, 22 Atl. Rep. 1094.

[4] Broughel v. Southern New England Telephone Co., 73 Conn. 614, 48 Atl. Rep. 751, 29 Am. St. 181.

[5] Louisville, etc. R. Co. v. Case's Adm'r, 9 Bush, 728; Louisville & N. R. Co. v. Milett's Adm'r, 20 Ky. L. Rep. 532, 46 S. W. Rep. 498.

[6] Louisville & N. R. Co. v. Morris, 14 Ky. L. Rep. 466, 20 S. W. Rep. 539.

it refused to reverse the judgment for the failure to specifically instruct to that effect.[1] In an action to recover damages to the estate it is not competent to prove that the decedent had a wife and children depending upon him for support.[2]

In Iowa, besides considering the facts indicated, the jury may regard the fact whether the deceased was married or single, and the recovery is limited to the present worth of his life. In fixing that, the living expenses of the deceased are to be regarded and also future impairment of his earning ability.[3] The rule in Oregon is to much the same effect, with the exception that the damages, because they are required to be administered as other personal property of the deceased, are not to be measured by a sum which, if put at interest, would yield a sum equivalent to the annual savings of the deceased during the probable length of his life. The opinion was expressed that no rule can be laid down by which the damages can be ascertained with even approximate mathematical certainty; the amount must depend upon the good sense and judgment of the jury with regard to the facts of each case.[4] Nominal damages are a sufficient compensation only when the estate has no distributees. The presumption is that an infant has a father, and that he supports his child and receives his earnings.[5]

§ 1278. Special damages. If some special injury results proximately from the death to one of the beneficiaries, or all of them who are provided for in the statutes, recovery may be had therefor. Thus, in Pym v. Great Northern R. Co.,[6] a change in the mode of distributing property among the members of a family, produced by the death complained of, although no pecuniary loss to the family in the aggregate would result and none would have arisen from the injury to the decedent had he lived, yet it being an injury resulting from the death,

[1] Chesapeake & O. R. Co. v. Lang's Adm'r, 100 Ky. 221, 38 S. W. Rep. 503, 40 id. 451, 41 id. 271, 19 Ky. L. Rep. 65; Louisville & N. R. Co. v. Kelly's Adm'r, 100 Ky. 421, 38 S. W. Rep. 852, 40 id. 452, 19 Ky. L. Rep. 69; Same v. Eakin's Adm'r, *supra*.

[2] Louisville & N. R. Co. v. Eakin's Adm'r, 103 Ky. 465, 45 S. W. Rep. 529, 46 id. 496, 47 id. 872; Same v. Shumaker's Adm'r, 21 Ky. L. Rep. 803, 53 S. W. Rep. 12.

[3] Wheelan v. Chicago, etc. R. Co., 85 Iowa, 167, 52 N. W. Rep. 119; Lowe v. Chicago, etc. R. Co., 89 Iowa, 420, 56 N. W. Rep. 519.

[4] Carlson v. Oregon Short Line, etc. R. Co., 21 Ore. 450, 458, 28 Pac. Rep. 497.

[5] Tutwiler Coal, etc. Co. v. Enslen, *supra*.

[6] 2 B. & S. 759, 4 id. 396.

it was held to be an injury to be compensated. So in a Wisconsin case where a widow's pension was reduced by the death of her child, in an action under the statute for damages resulting to her from the death of that child she was entitled to have this loss included in her recovery.[1] But in a late New Jersey case the damages resulting from the dissolution of a valuable partnership, by the death complained of, was not within the scope of the statute, which was held to give damages resulting from the severance of a relation of kinship, and not of contract.[2] It has also been ruled that funeral expenses, if recoverable at all, must be claimed in the pleadings as special damages.[3] The medical expenses incurred by or on behalf of the deceased cannot be recovered.[4]

§ 1279. Contracts exempting from liability. The cases bearing upon the validity of contracts between master and servant which affect the liability of the former to the family of the latter for damages under Lord Campbell's act and the American statutes modeled upon it are collected elsewhere.[5]

§ 1280. Where the injury is done in another state. These statutes have no extraterritorial effect. It is, however, a general principle that where, either by common law or statute, a right of action has become fixed and a legal liability incurred, if transitory, it may be enforced in the courts of any state in which jurisdiction of the defendant can be obtained, provided it is not against the public policy of the state where it is sought to be enforced. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action,[6] while all that pertains merely to the

[1] Ewen v. Chicago, etc. R. Co., 38 Wis. 613; Rowley v. London, etc. R. Co., L. R. 8 Ex. 221.

[2] Deamarest v. Little, 47 N. J. L. 28.

[3] Gay v. Winter, 34 Cal. 153.

[4] Pulling v. Great Eastern R. Co., 9 Q. B. Div. 110. See § 1272.

[5] § 6.

[6] Suth. on Stat. Const., § 14; Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. Rep. 413; Dennick v. Railroad Co., 103 U. S. 11; Wooden v. Western, etc. R. Co., 126 N. Y. 10, 22 Am. St. 803, 26 N. E. Rep. 1050, 13 L. R. A. 458; Leonard v. Columbia St. Navigation Co., 84 N. Y. 48, 38 Am. Rep. 491; Knight v. West Jersey R. Co., 108 Pa. 250, 56 Am. Rep. 200; Central R. Co. v. Swint, 73 Ga. 651; Morris v. Chicago, etc. R. Co., 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. Rep. 143; Shedd v. Moran, 10 Ill. App. 618; Hanna v. Grand Trunk R. Co., 41 id. 116; Ramsey v. Glenn, 33 Kan. 271, 6 Pac. Rep. 265; Boyce v. Wabash R. Co., 63 Iowa, 70, 50 Am. Rep. 730, 18 N. W. Rep. 673; Keenan v. Stim-

remedy will be controlled by the law of the state where the action is brought.[1] This rule applies to the amount recoverable if a limitation is fixed by the law of the forum.[2] As the remedy given by these statutes is one for a loss which the common law is generally regarded as defective in not providing compensation for, it would seem to come within this comity to permit a recovery for such a cause accruing in another state under the laws thereof, though in the state where the action is brought no such correction of the common law had been adopted, or a law for that purpose had been enacted which was materially different from that under which the alleged cause of action arose.[3] But in a majority of the cases decided in the state courts it is regarded as necessary, where the action is brought in another state than that where the death was caused, that the laws of the latter be shown and that they provide a remedy substantially the same as do the laws of the state where the

son, 32 Minn. 377, 20 N. W. Rep. 364; Bishop v. Globe Co., 135 Mass. 132; Taylor v. Pennsylvania Co., 78 Ky. 348, 39 Am. Rep. 244; Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. Rep. 951, 44 L. R. A. 410; Nicholas v. Burlington, etc. R. Co., 78 Minn. 43, 80 N. W. Rep. 776; Northern Pacific R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. Rep. 978; Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 18 Sup. Ct. Rep. 105; Van Doren v. Pennsylvania R. Co., 35 C. C. A. 282, 93 Fed. Rep. 260. See Willis v. Missouri Pacific R. Co., 61 Tex. 432, 48 Am. Rep. 301; Vawter v. Missouri Pacific R. Co., 84 Mo. 679, 54 Am. Rep. 105; Martin v. Kansas City, etc. R. Co., 77 Miss. 720, 27 So. Rep. 646; Thorpe v. Union Pacific Coal Co., 24 Utah, 475, 68 Pac. Rep. 145; Usher v. West Jersey R. Co., 126 Pa. 206, 17 Atl. Rep. 597, 4 L. R. A. 261, 12 Am. St. 863; Boulden v. Pennsylvania R. Co., — Pa. —, 54 Atl. Rep. 906.

The statutes of one state giving a right of action for wrongful death may be enforced in the federal courts of another state if not inconsistent with the statutes and policy thereof. Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

[1] Id.; Burlington, etc. R. Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622, 47 Am. Rep. 497; Mooney v. Union Pacific R. Co., 60 Iowa, 346, 14 N. W. Rep. 343.

[2] Wooden v. Western, etc. R. Co., 126 N. Y. 10, 26 N. E. Rep. 1050; Northern Pacific R. Co. v. Babcock, *supra*.

[3] Dennick v. Railroad Co., 103 U. S. 11; Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11, 16 N. W. Rep. 413, 47 Am. Rep. 771; Burrell v. Fleming, 109 Fed. Rep. 489, 47 C. C. A. 598; St. Louis, etc. R. Co. v. Haist, — Ark. —, 72 S. W. Rep. 893; The E. B. Ward, Jr., 16 Fed. Rep. 255; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Wall v. Hoskins, 5 Ired. 177; Lowry v. Inman, 46 N. Y. 119; Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 18 Sup. Ct. Rep. 105; Wooden v. Western, etc. R. Co., 126 N. Y. 10, 26 N. E. Rep. 1050, 22 Am. St. 803, 13 L. R. A. 458.

action is brought.[1] This rule governs, though the deceased was a resident of the jurisdiction of the forum and died therein, if the injury was sustained in another jurisdiction.[2] The courts of Ohio will not determine a case brought by an administrator of one killed in another state unless it be shown that such state allows the enforcement in its courts of Ohio statutes of like character. It is not enough to show merely that the courts of that state entertain actions to recover for wrongful killing in another state.[3] In Wisconsin the statute provides for the bringing of an action for a death caused in the state, and in some court thereof. This did not bar the right to maintain an action for a death which occurred in another state as the result of wrongful and negligent acts committed by the defendant in Wisconsin.[4] A statute which imposes liability to the extent of a fixed sum for the loss of life is in part penal in its nature, and will not be enforced by the courts of another jurisdiction than

[1] Vawter v. Missouri Pacific R. Co., 84 Mo. 679, 54 Am. Rep. 105; Richardson v. New York Central R. Co., 98 Mass. 85; St. Louis, etc. R. Co. v. McCormick, 71 Tex. 660, 9 S. W. Rep. 540, 1 L. R. A. 804; McCarthy v. Chicago, etc. R. Co., 18 Kan. 46, 26 Am. Rep. 742; Missouri Pacific R. Co. v. Lewis, 24 Neb. 848, 2 L. R. A. 67, 40 N. W. Rep. 401; Selma, etc. R. Co. v. Lacy, 43 Ga. 461; State v. Pittsburgh, etc. R. Co., 45 Md. 41; Oates v. Union Pacific R. Co., 104 Mo. 514, 16 S. W. Rep. 487; Barker v. Hannibal, etc. R. Co., 91 Mo. 86, 3 S. W. Rep. 486; Woodard v. Michigan, etc. R. Co., 10 Ohio St. 121; Wooden v. Western, etc. R. Co., 126 N. Y. 10, 13 L. R. A. 458, 22 Am. St. 803, 26 N. E. Rep. 1050; Cincinnati, etc. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. 67, 20 N. E. Rep. 287; O'Reilly v. New York, etc. R. Co., 16 R. I. 388, 17 Atl. 906, 5 L. R. A. 364; Hover v. Pennsylvania Co., 25 Ohio St. 667; Whitford v. Panama R. Co., 23 N. Y. 465; Nashville, etc. R. Co. v. Eakin, 6 Cold. 582; Vanderwerkin v. New York, etc. R. Co., 6 Abb. Pr. 239; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Needham v. Grand Trunk R. Co., 38 Vt. 294; Mackay v. Central R. Co., 4 Fed. Rep. 617; Taylor v. Pennsylvania Co., 78 Ky. 348, 39 Am. Rep. 244 (compare Bruce's Adm'r v. Cincinnati R. Co., 83 Ky. 174); Western, etc. R. Co. v. Strong, 52 Ga. 461; Chicago, etc. R. Co. v. Doyle, 60 Miss. 977; Nashville, etc. R. Co. v. Sprayberry, 8 Baxter, 341; Patton v. Pittsburgh, etc. R. Co., 96 Pa. 169; Knight v. West Jersey R. Co., 108 id. 250; Mexican Nat. R. Co. v. Slatter, 115 Fed. Rep. 593, 53 C. C. A. 239.

[2] De Harn v. Mexican National R. Co., 86 Tex. 68, 23 S. W. Rep. 381; Needham v. Grand Trunk R. Co., 38 Vt. 294; McCarthy v. Chicago, etc. R. Co., 18 Kan. 46; Van Doren v. Pennsylvania R. Co., 93 Fed. Rep. 260, 35 C. C. A. 282; Hegerich v. Keddie, 99 N. Y. 258, 267.

[3] Wabash R. Co. v. Fox, 64 Ohio St. 133, 59 N. E. Rep. 888, ruled under sec. 6134*a*, R. S.

[4] Rudiger v. Chicago, etc. R. Co., 94 Wis. 191, 68 N. W. Rep. 661.

that which enacted it. That part of such a statute as is compensatory cannot be enforced in a foreign jurisdiction because the liability would rest on the statute and the measure of it would be determined by the law of the forum.[1]

If a foreign corporation extends its railroad into an adjoining state on condition that suit may be brought against it in the state into which it goes on all claims upon it, suits may be brought there by citizens of the state of its domicile upon a cause of action arising in the latter under its statute. If such statute does not require a prosecution as a condition precedent to recovery for the death it will not be required by the court of the state in which the action is brought.[2] The homicide of a person in another state on a line of railroad owned and operated by a Georgia company is actionable in the latter state.[3] A right of action given by the laws of one state will not be enforced in the courts of another if it is denied by the common law and is not given by the statutes of the latter.[4]

[1] Dale v. Atchison, etc. R. Co., 57 Kan. 601, 47 Pac. Rep. 521; Matheson v. Kansas City, etc. R. Co., 61 Kan. 667, 60 Pac. Rep. 747.

[2] South Carolina R. Co. v. Nix, 68 Ga. 572.

[3] Central R. v. Swint, 63 Ga. 651.

[4] Texas & P. R. Co. v. Richards, 68 Tex. 375, 4 S. W. Rep. 627.

CHAPTER XXXVIII.

SEDUCTION.

§ 1281. The technical not the real gist of the action.
1282. Who may maintain the action.
1283. Evidence for plaintiff and damages recoverable.
1284. Evidence for defendant in mitigation.
1285. Criminal conversation, and alienation of affections.

§ 1281. The technical not the real gist of the action. At common law this action rests on the relation of [735] master and servant, and proceeds in form for loss of service. Trespass *vi et armis* is deemed proper where the servant resides with the master or parent; case may also be brought where the injury is not committed with force, or where the servant is only constructively in the master's service.[1] Slight evidence will establish sufficiently the relation, and the extent of the loss of service is not the measure of damages.[2] The allegations and proof on these points are almost an unmeaning formula — an obeisance to a shadow of the past — to reach the actual grievance. The action in reality is to afford redress for the injury done to the parent or other near relative or person standing *in loco parentis* for the dishonor and degradation suffered by the family in consequence of the seduction.[3] And large damages, which the court will seldom relieve against,[4] are recoverable, both for recompense to the plaintiff and punishment to the defendant. Caton, J., said: "Technically, the ground of recovery is the loss of the services of the daughter, and the rule of the books seems to be that the

[1] Briggs v. Evans, 5 Ired. 16; Parker v. Meek, 3 Sneed, 29; Mercer v. Walmsley, 5 Har. & J. 27, 9 Am. Dec. 486; Magninay v. Saudek, 5 Sneed, 146; Sutton v. Huffman, 32 N. J. L. 58; Greenwood v. Greenwood, 28 Md. 369; Bartley v. Richtmyer, 4 N. Y. 38; Cooley on Torts, 232, 233; Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233; Clough v. Tenney, 5 Me. 446.

[2] Coon v. Moffitt, 3 N. J. L. (*583) 169; Badgley v. Decker, 44 Barb. 577; Holliday v. Parker, 23 Hun, 72, 73; Bayles v. Burgard, 48 Ill. App. 371; Garretson v. Becker, 52 id. 255.

[3] Willeford v. Bailey, — N. C. —, 43 S. E. Rep. 928.

[4] Bennett v. Beam, 42 Mich. 346, 4 N. W. Rep. 8; Sargent v. ———, 5 Cow. 106; Willeford v. Bailey, *supra*.

father must prove some service in order to entitle him to maintain the action. This is nominally the ground on which the plaintiff's right of action rests, while practically, the right [736] to recover rests on far higher grounds, that is, the relation of parent and child, or guardian and ward, or husband and wife, as well as that of master and servant; and it seems almost beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages.[1] But the law may still require proof of service, or at least the right to service when the child is a minor; but this, as well as any other fact, may be proved by circumstances sufficient in themselves to satisfy the jury that the party seduced did actually render service to the plaintiff, and the most trivial service has always been held sufficient."[2] Even in England, where stricter proof of service is required, Blackburn, J., said: "In effect the damages are given to the plaintiff as standing in the relation of parent; and the action has at present no reference to the relation of master and servant beyond the mere technical point on which the action is founded."[3] This is according to the general current of authority.[4] While the courts adhere so far to the original distinctive character of the action as to require proof that the seduced female was in the service of the plaintiff at the time of the seduction, they do not require strict proof; very slight evidence of loss of service suffices in favor of one standing *in loco parentis*, and who is affected by the graver consequences of the seduction.[5] The actual loss sustained by the plaintiff, through the diminished ability of his daughter, relative or ward to yield him personal service, as well as the servile position of the supposed servant

[1] See § 1282.

[2] Doyle v. Jessup, 29 Ill. 462; Cook v. Bartlett, 179 Mass. 576, 61 N. E. Rep. 266; Willeford v. Bailey, *supra;* Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Hewit v. Prime, 21 Wend. 79; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Herring v. Jester, 2 Houst. 66.

[3] Terry v. Hutchinson, L. R. 3 Q. B. 602.

[4] Ellington v. Ellington, 47 Miss. 329; Patterson v. Thompson, 24 Ark. 55; Keller v. Donnelly, 5 Md. 211; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Phillips v. Hoyle, 4 Gray, 568; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100.

[5] Davidson v. Goodall, 18 N. H. 427; Hewit v. Prime, 21 Wend. 79; Clark v. Fitch, 2 id. 459, 20 Am. Dec. 639; Gray v. Durland, 51 N. Y. 424; Anderson v. Rigg, 64 N. J. L. 407, 45 Atl. Rep. 782.

herself in the family of her protector, is ordinarily little more than a mere fiction. It is one of those cases in which an action devised for one purpose has been found to serve a different one by the aid of the discretion which courts [737] have assumed in instructing the jury, and the readiness of the jury to render substantial justice by their verdict, where the forms of law imposed by the instructions of the court admit of their doing so.[1]

§ 1282. Who may maintain the action. The person seduced, whether a minor or of full age, cannot ordinarily maintain an action for her own seduction; she, being a partaker in the offense, cannot, it is said, come into court to obtain satisfaction for a supposed injury to which she consented.[2] The only mode in which the action has ever been maintained, except in pursuance of some statute,[3] unless it was against the general guardian of the ward who was seduced, in which case it has been ruled that she might maintain an action against him to recover for her seduction while she was under the age of consent and a member of his household,[4] has been by bringing it in the name of some person having a right to the services of the person seduced; and in that action damages are recoverable, not only for actual loss of service, but for a sum sufficient to punish the seducer.[5] The action cannot be maintained by the fiancée of the person seduced.[6] The cause of action given an infant female by statute does not bar an action by her father for the same act for which she may sue.[7] He

[1] Davidson v. Goodall, 18 N. H. 427.

[2] Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95; Woodward v. Anderson, 9 Bush, 624; Hamilton v. Lomax, 26 Barb. 615; Smith v. Richards, 29 Conn. 232, 240; Buckles v. Ellers, 72 Ind. 220; Weaver v. Bachert, 2 Pa. 80; Ellington v. Ellington, 47 Miss. 329; Ingwaldson v. Skrivseth, 7 N. D. 388, 72 N. W. Rep. 772; Conlon v. Cassidy, 17 R. I. 518, 23 Atl. Rep. 100. See Fidler v. McKinley, 21 Ill. 308.

[3] Provision has been made by statute in Michigan, Indiana, California, Alabama, Iowa, Oregon, Tennessee, and perhaps other states, for actions by the female seduced, in which she is permitted to recover such damages as juries will allow her. See 4 Am. Rep. 406; Breon v. Henkle, 14 Ore. 494, 13 Pac. Rep. 289; Franklin v. McCorkle, 16 Lea, 609, 57 Am. Rep. 244, and Harrison v. Prentice, 28 Ont. App. 140, 24 Ont. App. 677, as to the loss of service under the statute of Ontario.

[4] Graham v. Wallace, 50 App. Div. 101, 63 N. Y. Supp. 372. See Brattain v. Cannady, 96 Ind. 266.

[5] Hamilton v. Lomax, 26 Barb. 615.

[6] Case v. Smith, 107 Mich. 416, 65 N. W. Rep. 279, 61 Am. St. 341, 31 L. R. A. 282.

[7] Watson v. Watson, 49 Mich. 540,

has a right to the services of his minor daughter, and may maintain the action without proof of actual service, and, though she were at service away from home, if he had not divested himself of the right to recall her to his service.[1] He will not be deprived of his remedy though death results from the pregnancy following the seduction.[2] If the daughter marries another person than her seducer, prior to her father's loss of service or expenditure on account of the seduction, he cannot maintain an action, because he has no claim to her services after marriage,[3] unless his consent thereto was obtained by fraud.[4] A mother in case of the father's death has the same right to the services of her child as the father would have if [738] living,[5] and may sue for her seduction. There are, however, some adverse decisions.[6] In North Carolina the mother

544, 14 N. W. Rep. 489; Bartlett v. Kochel, 88 Ind. 425.

[1] Simpson v. Grayson, 54 Ark. 404, 26 Am. St. 52, 16 S. W. Rep. 4; Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. Rep. 267, 27 Am. St. 521, 14 L. R. A. 700; Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Nickleson v. Stryker, 10 Johns. 115, 6 Am. Dec. 318; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Milward, 11 id. 343; Dain v. Wyckoff, 7 id. 191; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Hewit v. Prime, 21 Wend. 79; Greenwood v. Greenwood, 28 Md. 369; Boyd v. Byrd, 8 Blackf. 113, 44 Am. Dec. 740; Keller v. Donnelly, 5 Md. 211; Kendrick v. McCrary, 11 Ga. 603; Vassel v. Cole, 10 Mo. 634, 47 Am. Dec. 136; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Mohry v. Hoffman, 86 Pa. 358; Garretson v. Becker, 52 Ill. App. 255; Beaudette v. Gogne, 87 Me. 534, 33 Atl. Rep. 23; Scarlett v. Norwood, 115 N. C. 284, 20 S. E. Rep. 459; Ingwaldson v. Skrivseth, 7 N. D. 388, 72 N. W. Rep. 772; Middleton v. Nichols, 62 N. J. L. 636, 43 Atl. Rep. 575.

[2] Ingerson v. Miller, 47 Barb. 47.

[3] Humble v. Shoemaker, 70 Iowa, 223, 30 N. W. Rep. 492.

[4] Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. Rep. 267, 27 Am. St. 521, 14 L. R. A. 700.

[5] Gray v. Durland, 50 Barb. 100, 50 N. Y. 424; Furman v. Van Sise, 56 id. 435, 15 Am. Rep. 441; Dedham v. Natick, 16 Mass. 135; Blanchard v. Ilsley, 120 id. 487, 21 Am. Rep. 535; Matthewson v. Perry, 37 Conn. 435, 9 Am. Rep. 339; Keller v. Donnelly, 5 Md. 211; Villipique v. Shuler, 3 Strobh. 462.

If it is alleged that the daughter was the servant of the wife and that the wife was deprived of her services, the right of action is in the wife alone; but the husband may be joined as a plaintiff. Anderson v. Rigg, 64 N. J. L. 407, 45 Atl. Rep. 782.

[6] South v. Denniston, 2 Watts. 474; Bartley v. Richtmyer, 4 N. Y. 38.

In Badgley v. Decker, 44 Barb. 577, it was held that at common law the mother could not maintain an action for the seduction of the daughter while the father was living. But since the recent statutes of that state respecting married women, where a husband has abandoned his wife and family, and resides in another state, the wife, owning a house and being engaged in the business of keeping boarders, on her sole and separate

may maintain the action in lieu of the father if the latter was living out of the state,[1] and if he is insane she may sue as his next friend, having been regularly appointed such.[2] In a recent Irish case the seduction and pregnancy occurred during the life-time of the woman's father; the confinement, after his death. A recovery was denied the mother because the daughter was not her servant when the seduction took place.[3] In some cases in this country the injustice of such a rule has been avoided by making the relation at the time of the confinement the test of liability;[4] but there has been dissent from this view.[5]

A father loses the right to his daughter's service when she arrives at age; but if afterwards she still continues to reside with him, and is to some extent in his service, he may sue for her seduction happening during the time of such service.[6] The

account, may sue alone for the seduction of her daughter, over twenty-one years of age, who resides with and performs service for her about the house.

In George v. Van Horn, 9 Barb. 523, it was held that an action cannot be maintained by a mother, after the death of her husband, for seduction of their daughter in his life-time, when the daughter at the time of the seduction was over twenty-one years of age and was residing with her brother at his residence, and taking charge of his family. The court also held that the executors and administrators of a deceased father or mother cannot maintain this action for the seduction of their daughter in their life-time. As well might the action lie, say the court, for criminal conversation with his wife. They cannot represent his aggravated feelings, and the personal disgrace heaped upon him by such events. These causes of action are purely personal, and like assaults, libel and slander die with the person. Logan v. Murray, 6 S. & R. 175, 9 Am. Dec. 422. See Holliday v. Parker, 23 Hun, 71; Noice v. Brown, 39 N. J. L. 569; Coon v. Moffitt, 3 id. 436.

[1] Abbott v. Hancock, 123 N. C. 99, 31 S. E. Rep. 268; Gould v. Erskine, 20 Ont. 347.

[2] Abbott v. Hancock, *supra*.

[3] Hamilton v. Long, 36 Irish L. T. Rep. 189, [1903] 2 Irish, 407.

[4] Coon v. Moffit, 3 N. J. L. 436; Parker v. Meek, 3 Sneed, 29.

[5] Bartley v. Richtmyer, 4 N. Y. 38; South v. Denniston, 2 Watts, 474.

[6] Nickleson v. Stryker, 10 Johns. 115, 6 Am. Dec. 318; Briggs v. Evans, 5 Ired. 21; Millar v. Thompson, 1 Wend. 447; Lee v. Hodges, 13 Gratt. 726; Sutton v. Huffman, 32 N. J. L. 58; Wilhoit v. Hancock, 5 Bush, 567; Dain v. Wyckoff, 7 N. Y. 191; Patterson v. Thompson, 24 Ark. 55; Bayles v. Burgard, 48 Ill. App. 371; Beaudette v. Gayne, 87 Me. 534, 33 Atl. Rep. 23; Cumber v. Morley, 4 Vict. L. R. (law) 3; Griffiths v. Teetgen, 15 C. B. 344.

This rule is not altered by a statute which provides in one section that a father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the

mere relation of parent and child will not give a right of action for the seduction of an unmarried female; that of master and servant, either actual or constructive, must exist. She must be under his actual or constructive control and dominion. If such a relation exists, it matters not to the cause of action whether the plaintiff be the parent, or merely stands in the relation of parent. An uncle, an aunt, a step-father, a brother, or one having no relationship or affinity to the injured [739] female, can sustain the action.[1] It is not necessary that the arrangement by which the relation of master and servant is established should have any permanent binding force between the parties to it. If it exists in fact and the immediate parties are acting under it at the time of the seduction, however imperfect its obligation may be, the defendant, who by his wrongful act has interrupted it, cannot set up that it was liable to be revoked at any time without the assent of the master.[2] An imbecile adult daughter is to be regarded as a

ward, though the daughter or ward is not living with or in the service of the plaintiff at the time of the seduction, or afterward, and there is no loss of service; and in another that a father, or in case of his death, or desertion of his family, the mother, may maintain an action for the injury of the child, and the guardian for the injury of the ward, notwithstanding the word "child" in the latter section has been interpreted to mean minor child. Schmit v. Mitchell, 59 Minn. 251, 61 N. W. Rep. 140.

In answer to the contention that a father was only entitled to recover nominal damages because the daughter was an adult and away from home, the court said it must consider that the father had lost the comfort of his daughter, and that he is the parent of other children who may be corrupted by her example. As to the woman being away from home, nothing could be said on that head, because she was in an age and in a position where it was proper she should earn her own livelihood. The only effect of a statute dispensing with allegation or proof of loss of service was to leave the rights of the plaintiff as they were before it was enacted. Clapp v. De La Perrelle, 17 Vict. L. R. 413.

[1] Furman v. Van Sise, 56 N. Y. 441; Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639; Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Millar v. Thompson, 1 Wend. 447; Davidson v. Goodall, 18 N. H. 423; Ball v. Bruce, 21 Ill. 161; Roberts v. Connelly, 14 Ala. 235; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Millward, 11 id. 343; Dain v. Wyckoff, 18 id. 45, 72 Am. Dec. 493; Fernsler v. Moyer, 3 W. & S. 416, 39 Am. Dec. 33; Coon v. Moffitt, 3 N. J. L. 436; Manwell v. Thomson, 2 C. & P. 303; Edmunson v. Machell, 2 T. R. 4; Irwin v. Dearman, 11 East, 23; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Magninay v. Saudek, 5 Sneed, 146.

[2] Lipe v. Eisenlerd, 32 N. Y. 229, 234; Gray v. Durland, 51 id. 124; Riddle v. McGinnis, 22 W. Va. 253.

minor, for the loss of whose services by reason of seduction the father may recover so long as she remains at his home or under his control.[1]

There is a tendency on the part of the courts to overthrow the legal fiction that the action for seduction is based on the loss of service. In Kansas it has been held that the action may be maintained upon the mere relation of parent and daughter alone, the latter being of age, and living with her mother. This view is based upon the provisions of the code which abolish the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing, including the abolishment of feigned issues, and the declaration that the petition must contain a statement of the facts constituting the cause of action.[2] In North Carolina an adult woman who has been seduced may sue in her own name to recover therefor by virtue of a provision of the constitution abolishing feigned issues, supplemented by the declaration of the code that an action must be brought by the real party in interest. There the action is for an injury to person or character; it also involves fraud and deceit.[3]

§ 1283. Evidence for plaintiff, and damages recoverable. The rule as to damages is the same whether the daughter be a minor or of full age; the plaintiff is not limited in his recovery to such as are merely compensatory. He may recover exemplary damages when he is so connected with her as to be capable of receiving injury through her dishonor,[4] regardless of whether malice existed; the act of seduction is necessarily wilful.[5] The wealth of the defendant is a proper subject of inquiry in respect to exemplary damages.[6] In estimating the

[1] Hahn v. Cooper, 84 Wis. 629, 54 N. W. Rep. 1022, citing Lipe v. Eisenlerd, 32 N. Y. 229.

[2] Anthony v. Norton, 60 Kan. 341, 56 Pac. Rep. 529, 44 L. R. A. 757, 72 Am. St. 360.

[3] Hood v. Sudderth, 111 N. C. 215, 16 S. E. Rep. 397.

[4] Russell v. Chambers, 31 Minn. 54, 16 N. W. Rep. 458; Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. Rep. 267, 27 Am. St. 521, 14 L. R. A. 700; Lipe v. Eisenlerd, 32 N. Y. 229; Wilson v. Sproul, 3 P. & W. 49; Hornketh v. Barr, 8 S. & R. 36, 11 Am. Dec. 568; Kerns v. Hagenbuchle, 60 N. Y. Super. Ct. 228, 17 N. Y. Supp. 369; Ingwaldson v. Skrivseth, 7 N. D. 388, 393, 75 N. W. Rep. 772; Scarlett v. Norwood, 115 N. C. 284, 20 S. E. Rep. 459; Willeford v. Bailey, — N. C. —, 43 S. E. Rep. 728.

[5] Stowers v. Singer, 24 Ky. L. Rep. 395, 68 S. W. Rep. 637.

[6] Willeford v. Bailey, — N. C. —, 43 S. E. Rep. 928.

injury the jury may take into consideration, besides the loss of services and the disbursements for medical treatment and other necessary expenses, the wounded feelings and affections of the parent, the wrong done to him in his domestic and social relations, the stain and dishonor brought upon his family, and the grief and affliction suffered in consequence of it, and give damages accordingly.[1] If the action is brought by any other person than a parent standing in the relation of parent it will be governed by the same principles and rules of [740] evidence; and the court and jury at the trial will make the proper discrimination as respects the *quantum* of compensation.[2] Damages for wounded feelings, including a sense of personal and family disgrace, are inferred as a natural and necessary consequence of the seduction, and need not be specially alleged.[3] There cannot be a recovery of damages based on the future condition of the daughter and the offspring of the seduction, or for the former's loss of marriage.[4] In an action by the seduced woman the publicity given to the fact of seduction by the defendant may be proven in aggravation of damages if it has been pleaded,[5] and in such action the plaintiff may recover for her anguish of mind, and the pain and suffering incident to the birth of a child, the fruit of the seduction.[6] Under the California statute the person seduced may recover exemplary damages regardless of whether she was rendered unconscious because of the conduct of the defendant and he committed the act under circumstances which

[1] Russell v. Chambers, *supra;* Morgan v. Ross, 74 Mo. 318; Riddle v. McGinnis, 22 W. Va. 253; Barbour v. Stephenson, 32 Fed. Rep. 66; Herring v. Jester, 2 Houst. 66; Taylor v. Shelkett, 66 Ind. 297; Fox v. Stevens, 13 Minn. 272; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Wilson v. Sproul, *supra;* Hornketh v. Barr, *supra;* Coon v. Moffit, 3 N. J. L. 436; Pruitt v. Cox, 21 Ind. 15; Phillips v. Hoyle, 4 Gray, 568; Hatch v. Fuller, 131 Mass. 574; Felkner v. Scarlet, 29 Ind. 154; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Kendrick v. McCrary, 11 Ga. 603; Blagge v. Ilsley, 127 Mass. 198; Garretson v. Becker, 52 Ill. App. 255; French v. Deane, 19 Colo. 504, 36 Pac. Rep. 609, 24 L. R. A. 387; Mighell v. Stone, 175 Ill. 261, 51 N. E. Rep. 906; Middleton v. Nichols, 62 N. J. L. 636, 640, 43 Atl. Rep. 575; Milliken v. Long, 188 Pa. 411, 41 Atl. Rep. 540; Cook v. Bartlett, 179 Mass. 576, 61 N. E. Rep. 266.

[2] Magninay v. Saudek, 5 Sneed, 146.

[3] Lunt v. Philbrick, 59 N. H. 59; Willeford v. Bailey, — N. C. —, 43 S. E. Rep. 928.

[4] Comer v. Taylor, 82 Mo. 341.

[5] Simons v. Busby, 119 Ind. 13, 21 N. E. Rep. 451.

[6] Gemmill v. Brown, 25 Ind. App. 6, 56 N. E. Rep. 691.

made him guilty of rape, or whether she consciously consented thereto.[1]

As the action is not generally maintainable on the mere relation of parent and child, there must be some proof of loss of service, or other loss resulting from the seduction. Proof of sexual intercourse, or even of seduction, will not sustain the action.[2] The plaintiff must show that there resulted therefrom some direct injury to his rights as master.[3] It will be assumed that there is a loss of service if pregnancy follows, or sickness, or the communication of any disease.[4] So if the sense of shame and wrong-doing diminish the servant's ability to work.[5] Pregnancy or the birth of a child are not essential. It is sufficient if there be illness of the daughter, resulting from the seduction, and a consequent inability or reduced ability to labor, or if there be expenses necessitated by the same [417] cause.[6] It is not important to the right of action that the loss

[1] Marshall v. Taylor, 98 Cal. 55, 32 Pac. Rep. 867, 35 Am. St. 144.

[2] Comer v. Taylor, 82 Mo. 341; Kinney v. Laughenour, 89 N. C. 365; Delvee v. Boardman, 20 Iowa, 446; Hill v. Wilson, 8 Blackf. 123.

[3] White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282.

[4] Anderson v. Ryan, 8 Ill. 583; Leucker v. Steileu, 89 id. 545, 31 Am. Rep. 104; Hewit v. Prime, 21 Wend. 79; Hogan v. Cregan, 6 Robert. 138; Mohelsky v. Hartmeister, 68 Mo. App. 318, 324.

[5] In Blagge v. Ilsley, 127 Mass. 191, Colt, J., said: "There was evidence from several witnesses, including the plaintiff and the daughter, that the latter appeared strong and well before the alleged seduction, and that afterwards she became nervous and excitable, and did not appear to be herself. Upon this part of the case the jury were told that the plaintiff might recover if they were satisfied that, as the immediate result of the criminal act, the health of the daughter failed, and there was a consequent loss of ability to render service; and it must have been found by the jury that the proximate effect of the seduction was an incapacity to work. In the opinion of a majority of the court, it cannot be declared, as matter of law, that this instruction was erroneous, or that the evidence did not justify the finding. The decline in the daughter's health and spirits directly followed the wrong charged. The daughter was herself a witness, and there was opportunity for the jury to judge of her physical strength and temperament, her natural delicacy and sensibility to the injury alleged. It cannot be laid down as a matter of law that loss of health would not be the natural, probable and direct consequence of the defendant's act, although that act was followed by no sexual disease and no pregnancy. Shame, humiliation and mental distress, affecting the sensibilities of the victim and her capacity for faithful service, may well be a probable and natural consequence of the wrong, wholly without regard to the fear of abandonment or exposure."

[6] Id.; Night v. Wilcox, 18 Barb. 212;

should result from the seduction in any particular way. It will be enough if a loss has been occasioned which is a legal, natural and direct consequence of the wrong.[1] The parent need not, in order to recover damages, including those which are exemplary, in excess of his actual pecuniary loss, show that his daughter's debauchment was accomplished by seductive arts.[2] The age of the daughter and the circumstances under which she was debauched may aggravate or mitigate the damages, but they do not afford any basis for limiting, as matter of law, the father's damages to his actual money loss.[3] Where the illness of the daughter, following seduction, is not the consequence thereof, but of the publication of her shame, it will not be deemed a proximate result of the wrong.[4]

It is competent to show the circumstances under which the female was seduced, and the means used for corrupting her mind, — the promises, flattery or deception employed.[5] An exception has been made of promises of marriage by some courts because the damages for the breach of it belong to the daughter seduced.[6] When such evidence is admitted the jury should be cautioned to give no damages for breach of the marriage promise.[7] It may be proved in what manner and on what terms the defendant visited her, the family and her relations.[8] Evidence in a father's action of a promise of marriage

White v. Nellis, 31 id. 279; Abraham v. Kidney, 104 Mass. 222, 6 Am. Rep. 620; Stiles v. Tilford, 10 Wend. 339.

[1] Night v. Wilcox, 15 Barb. 279.

[2] Hein v. Holdridge, 78 Minn. 468, 81 N. W. Rep. 522.

[3] Id., citing Fox v. Stevens, 13 Minn. 252; Russell v. Chambers, 31 Minn. 54, 16 N. W. Rep. 458; Stoudt v. Shepherd, 73 Mich. 558, 41 N. W. Rep. 696; McAuley v. Birkhead, 13 Ired. 28, 55 Am. Dec. 427; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Barbour v. Stephenson, 32 Fed. Rep. 66; Lawrence v. Spence, 99 N. Y. 669, 2 N. E. Rep. 145; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100.

[4] Night v. Wilcox, 14 N. Y. 413.

[5] Watson v. Watson, 53 Mich. 168, 18 N. W. Rep. 605; Bracey v. Kibbe, 31 Barb. 273; Phelin v. Kenderdine, 20 Pa. 354; White v. Campbell, 13 Gratt. 573; Fox v. Stevens, 13 Minn. 272; Kahn v. Freytag, 2 Robert. 678; Parker v Monteith, 7 Ore. 277.

[6] Comer v. Taylor, 82 Mo. 341; Foster v. Schofield, 1 Johns. 297; Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639; Gillett v. Mead, 7 Wend. 193; Brownell v. McEwen, 5 Denio, 367; Kip v. Berdan, 20 N. J. L. 239.

In Pennsylvania, if the intercourse is admitted, the seduction being denied, the father of the family may show, in aggravation of damages, that the defendant, after discovering that the woman was pregnant, had agreed to marry her. Milliken v. Long, 188 Pa. 411, 41 Atl. Rep. 540.

[7] Phelin v. Kenderdine, 20 Pa. 354.

[8] Herring v. Jester, 2 Houst. 66; Parker v. Monteith, 7 Ore. 277; Da-

is not admissible as a ground of damage,[1] nor can he recover compensation for the support and maintenance of the illegitimate child.[2] But where the seduced may sue in her own name, she may allege and prove both the promise of marriage and seduction, with a view to damages for the double wrong,[3] and may prove many acts on the part of the defendant though they extend over a considerable period of time, as well as all the consequences of the seduction.[4] In such an action the use of force is an aggravation of the wrong,[5] and the jury may regard any indignities offered her during the trial, any imputations against her character or virtue, if they were untrue, in which event they will be considered as wantonly made.[6] The plaintiff may show his relationship to the seduced and the [742] situation of the family,[7] and that the defendant aggravated his wrong-doing by producing an abortion.[8] In Tennessee there cannot be a recovery for an abortion and the attendant indignities unless damages therefor are specially pleaded, particularly if another suit be pending against the defendant.[9]

There is some conflict of decision on the question of proving the character and social standing of the plaintiff; but it is believed that where he sustains such relation to the seduced as to suffer injury to his feelings through her dishonor, it is, according to the weight of authority, competent for him to

vidson v. Goodall, 18 N. H. 423; Brownell v. McEwen, 5 Denio, 367.

If the defendant held out expectations to the plaintiff and induced the reasonable belief that he intended to marry his daughter, the insult done in the abuse of his hospitality and the betrayal of his confidence may be considered in awarding compensation for his injured feelings. Lunt v. Philbrick, 59 N. H. 59.

[1] Robinson v. Burton, 5 Harr. 335; Gillett v. Mead, 7 Wend. 193; Odell v. Stephens, 12 Ind. 384; Herring v. Jester, 2 Houst. 66; Kip v. Berdan, 20 N. J. L. 239; Hines v. Sinclair, 23 Vt. 108.

[2] Hitchman v. Whitney, 9 Harr. 512; Sargent v. ———, 5 Cow. 106.

[3] §§ 983, 984; Lee v. Hefley, 21 Ind. 98; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. Rep. 293.

[4] McCoy v. Trucks, 121 Ind. 292, 22 N. E. Rep. 86; Shewalter v. Bergman, 124 Ind. 155, 23 N. E. Rep. 686; Russell v. Chambers, 31 Minn. 54, 16 N. W. Rep. 458; Badder v. Keefer, 91 Mich. 611, 52 N. W. Rep. 60; Baird v. Boehner, 77 Iowa, 622, 42 N. W. Rep. 454.

[5] Marshall v. Taylor, 98 Cal. 55, 32 Pac. Rep. 867, 35 Am. St. 144.

[6] Ferguson v. Moore, 98 Tenn. 342, 348, 39 S. W. Rep. 341.

[7] Wilson v. Sproul, 3 P. & W. 49.

[8] White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Klopfer v. Bromme, 26 Wis. 372; Gunder v. Tibbits, 153 Ind. 591, 600, 601, 55 N. E. Rep. 762.

[9] Ferguson v. Moore, 88 Tenn. 342, 349, 39 S. W. Rep. 341.

show, to affect damages, the character and social standing of his own family and the defendant's pecuniary circumstances.[1] It is held in Indiana that in an action by the seduced female the defendant's financial standing may be shown;[2] but in Iowa neither the plaintiff's financial circumstances nor that of her family is a proper subject of proof if the defendant did not avail himself of it to effect the seduction.[3] The measure of damages in this action is peculiarly within the province of the jury.[4] It was long ago remarked by Wilmot, C. J., that "actions of this sort are brought for example's sake, and although plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages."[5] "It is believed," said Sherwood, C. J., "that no case can be found in the books where the verdict in an action such as this has been set aside upon the sole ground of awarding excessive damages."[6] There is especial reason why verdicts will not be interfered with where the seduced is the plaintiff.[7]

Debauchment with seduction is one injury, and debauchment without it is another. The rule for the admeasurement of the damages in the one case differs from that in the other. In the former, exemplary damages are allowable; but if sexual intercourse takes place without seduction — without the aid of flattery and artifice — no recovery can be had by the father beyond the loss of services and incidental expenses, unless the

[1] McAuley v. Birkhead, 13 Ired. 28, 55 Am. Dec. 427; Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88; Herring v. Jester, 2 Houst. 66; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Clem v. Holmes, 33 Gratt. 722, 36 Am. Rep. 793; Parker v. Monteith, 7 Ore. 277; Applegate v. Ruble, 2 A. K. Marsh. 128; Lavery v. Crooke, 52 Wis. 612, 9 N. W. Rep. 599, 38 Am. Rep. 768; Riddle v. McGinnis, 22 W. Va. 253. *Contra*, Hodsall v. Taylor, L. R. 9 Q. B. 79; Dain v. Wyckoff, 7 N. Y. 191; Watson v. Watson, 53 Mich. 168, 18 N. W. Rep. 605. See Haynes v. Sinclair, 23 Vt. 108.

[2] Shewalter v. Bergman, 123 Ind. 155, 23 N. E. Rep. 686; Wilson v. Shepler, 86 Ind. 275; Gemmill v. Brown, 25 Ind. App. 6, 56 N. E. Rep. 691.

[3] West v. Druff, 55 Iowa, 335, 7 N. W. Rep. 636.

[4] Riddle v. McGinnis, 22 W. Va. 253, 280.

[5] Tullidge v. Wade, 3 Wils. 18; Kerns v. Hagenbuchle, 60 N. Y. Super. Ct. 228, 17 N. Y. Supp. 369.

[6] Morgan v. Ross, 74 Mo. 318; Marshall v. Taylor, 98 Cal. 55, 32 Pac. Rep. 867, 35 Am. St. 144; Mighell v. Stone, 74 Ill. App. 129; Gunder v. Tibbits, 153 Ind. 591, 608, 55 N. E. Rep. 762; Baird v. Boehmer, 77 Iowa, 622, 42 N. W. Rep. 454.

[7] Marshall v. Taylor, *supra*.

debauchment is accomplished with force and violence, or under circumstances constituting the crime of rape. In that event exemplary damages may be recovered.[1] In an action by a wife to recover damages for the seduction of her husband, evidence is admissible to prove the affectionate feeling entertained by him for her before the defendant intervened, and to show a subsequent change of feeling; and for the same purpose, and to show the mental suffering of the plaintiff, proof may be made of manifestations of remorse by him in interviews with her, and of grief by her after the intimacy between him and the defendant began.[2]

§ 1284. Evidence for defendant in mitigation. The bad moral character of the plaintiff and his character for chastity, it is held in New York, cannot be proved in reduction of damages. Comstock, J., speaking for the court, said: "It is true that in actions of this kind compensation is given for injured sensibilities of the parent, and that a pecuniary value is placed upon the society and attentions of a virtuous daughter. But to justify evidence of bad reputation in general, or in a particular respect, it must first be shown that the sensibilities of such a parent are less acute, and that the society and affections of a virtuous daughter are to him less valuable than to other men. This cannot be affirmed in fact, and there is no such presumption in law."[3] The defendant will not be permitted to show that the plaintiff is devoid of natural sensibilities.[4] In Delaware it has been held that the defendant may show the plaintiff's dissolute habits, though not his general reputation in respect to virtue;[5] and in Tennessee that it may be shown by general reputation that the plaintiff is a person of profligate principles and dissolute habits, but evidence of particular acts should not be received.[6] It is no defense [743] to the parent's action that the daughter consented willingly to the seduction, for her consent will not deprive such plaintiff of his action;[7] neither is the defendant's responsibility less-

[1] Mohelsky v. Hartmeister, 68 Mo. App. 318; De Haven v. Helvie, 126 Ind. 82, 25 N. E. Rep. 874.

[2] Ash v. Prunier, 105 Fed. Rep. 722, 44 C. C. A. 675.

[3] Dain v. Wyckoff, 18 N. Y. 47.

[4] Grider v. Dent, 22 Mo. 490.

[5] Robinson v. Burton, 5 Harr. 335.

[6] Reed v. Williams, 5 Sneed, 580; Thompson v. Clendening, 1 Head, 287.

[7] Bartlett v. Kochel, 88 Ind. 425; Barbour v. Stephenson, 32 Fed. Rep. 66; McAuley v. Birkhead, 13 Ired. 28, 55 Am. Dec. 427.

ened because he accomplished his purpose by force.[1] In an action by the woman for breach of promise and seduction her criminal misconduct, known to the defendant before he made the promise to marry and participated in by him, cannot lessen his liability.[2]

It is presumed, in the absence of evidence to the contrary, that the person seduced was virtuous at the time of the seduction, and was a comfort and help to her parents if she lived at home.[3] But her general character is in issue on the question of damages. It may be impeached by general evidence,[4] and specific acts of lewdness and immorality may in some states be shown[5] if the seduced is the plaintiff.[6] Not only may want of previous chastity be proved by general reputation and specific acts of unchastity, but it may be proven by evidence which tends to show impure conversation and improper and familiar association with men.[7] In some states the evidence to impeach character for chastity must be confined to general reputation.[8] Previous chastity is not essential to the cause of action, but antecedent misconduct may have much influence on the question of damages for the parent's shame and disgrace.[9] "Proof of former unchastity may be consid-

[1] Dalman v. Koning, 54 Mich. 320, 20 N. W. Rep. 61; Bradshaw v. Jones, 103 Tenn. 331, 50 S. W. Rep. 1072.

[2] Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. Rep. 293.

[3] People v. Brewer, 27 Mich. 137; Gemmill v. Brown, 25 Ind. App. 6, 56 N. E. Rep. 691; Robinson v. Powers, 129 Ind. 480, 28 N. E. Rep. 1112.

[4] Reed v. Williams, 5 Sneed, 580; Robinson v. Burton, 5 Harr. 335; Smith v. Milburn, 17 Iowa, 30; Lea v. Henderson, 1 Cold. 146; Bamfield v. Massey, 1 Camp. 461; Dodd v. Norris, 3 id. 519; West v. Druff, 55 Iowa, 335, 7 N. W. Rep. 636; Dalman v. Koning, *supra;* Parker v. Coture, 63 Vt. 155, 25 Am. St. 750, 21 Atl. Rep. 494. See Wallace v. Clark, 2 Overt. 93, 5 Am. Dec. 654.

[5] White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Love v. Masoner, 6 Baxter, 24, 32 Am. Rep. 522; Verry v. Watkins, 7 C. & P. 308; Hogan v. Cregan, 6 Robert. 138; Kahn v. Freytag, 2 id. 678. See Ford v. Jones, 62 Barb. 484.

[6] Gemmill v. Brown, *supra.*

[7] West v. Druff, 55 Iowa, 335, 7 N. W. Rep. 636; Stewart v. Smith, 92 Wis. 76, 65 N. W. Rep. 736.

[8] Shattuck v. Myers, 13 Ind. 46; Hoffman v. Kermerer, 44 Pa. 452; Smith v. Yaryan, 69 Ind. 445, 35 Am. Rep. 232; Doyle v. Jessup, 29 Ill. 460.

[9] Hill v. Wilson, 8 Blackf. 123; Comer v. Taylor, 82 Mo. 341; Simpson v. Grayson, 54 Ark. 404, 16 S. W. Rep. 4, 26 Am. St. 52; Smith v. Milburn, 17 Iowa, 30; Milliken v. Long, 188 Pa. 411, 41 Atl. Rep. 540. See Lea v. Henderson, 1 Cold. 146, where it was held that the fact that another person had had intercourse with the person seduced before her alleged seduction by the defendant, this being

ered in mitigation of damages, and to show that the sexual intercourse was without enticement, artifice, persuasion or solicitation, but is not of itself a defense if the plaintiff had, for a reasonable time before the alleged seduction, been leading a virtuous life."[1]

The consent or connivance of the parent or one suing in the character of master, to the seduction, will be a bar to the action. And conduct, not amounting thereto, but only to negligence or want of ordinary prudence, may be shown as tending to mitigate damages.[2] In such action it has been ruled that a marriage between the seducer and the seduced and his acquittal on an indictment for the seduction may be proved for the same purpose.[3] In Illinois and elsewhere it has [744] been held that an offer of marriage made by the defendant after the seduction cannot be considered in mitigation.[4] Evidence of the defendant's general reputation for chastity and purity of life is not admissible.[5] If money furnished by the

unknown to the defendant or to the public at the time of the seduction, is not to be considered by the jury in mitigation.

The unchaste conduct of the female is provable in mitigation of actual damages under a general denial without being otherwise pleaded. Wandell v. Edwards, 25 Hun, 498.

One who injures the reputation of another cannot reap a benefit from his wrong; hence the defendant cannot show that after the seduction the plaintiff's character was bad. Shewalter v. Bergman, 123 Ind. 155, 23 N. E. Rep. 686; Ayer v. Colgrove, 81 Hun, 322, 30 N. Y. Supp. 788. Nor that the female was guilty of specific unchaste acts. McKern v. Calvert, 59 Mo. 243; Morgan v. Ross, 74 id. 318.

[1] Stowers v. Singer, 24 Ky. L. Rep. 395, 68 S. W. Rep. 637, and cases cited; Patterson v. Hayden, 17 Ore. 238, 21 Pac. Rep. 129.

[2] Travis v. Barger, 24 Barb. 614; Richards v. Fouts, 11 Ired. 466; Graham v. Smith, 1 Edm. Sel. Cas. 267; Sherwood v. Tetman, 55 Pa. 77; Parker v. Elliott, 6 Munf. 587; Smith v. Masten, 15 Wend. 270.

In an action for the seduction of the plaintiff's daughter, the fact of the seduction of another of his daughters three years previously by other than the defendant, and the circumstances connected therewith, is not admissible in mitigation as tending to show that the plaintiff was chargeable with careless indifference in affording opportunities for criminal intercourse between the defendant and the daughter whose seduction he is alleged to have accomplished. Tourgee v. Rose, 19 R. I. 432, 37 Atl. Rep. 9.

[3] Eichar v. Kistler, 14 Pa. 282, 53 Am. Dec. 551.

[4] White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Ingersoll v. Jones, 5 Barb. 661.

[5] Watson v. Watson, 53 Mich. 168, 18 N. W. Rep. 605.

The Minnesota court admits that the generally accepted rule is that evidence of the general character of

defendant to the plaintiff's daughter is not shown to have been applied to plaintiff's benefit or in reduction of his damages, such payments cannot be proven.[1]

§ 1285. Criminal conversation, and alienation of affections. The husband's injury by the wrong of criminal conversation consists in his mental suffering from the dishonor of the marriage bed, and the loss of the affections of his wife and the comfort of her society, as well as the pecuniary injury from loss of her services. The loss of "services" in this connection does not ordinarily involve a loss measurable by pecuniary standards; the term implies, rather, whatever of aid, assistance, comfort and society the wife would be expected to render or bestow upon her husband under the circumstances in which they lived.[2] It is immaterial that the wife is entitled to her own earnings.[3] The extent of the actual injury will, of course, depend on their prior relations and the practical consequences between them of her defection. In this class of cases an actual marriage must be proved,[4] and the *gravamen* of the action is that the defendant has committed adultery with the wife.[5] The right of action is not affected if the wrong was committed by force,[6] nor by the fact that the plaintiff obtained a divorce from his wife a short time before suit was brought,[7] or condoned her wrong,[8] or had not lived with her for a considerable time.[9] The amount of damages is left to the discretion of the

parties to civil actions, where character is not a part of the issue, is inadmissible. But, on the ground of *stare decisis*, it has been held that evidence of the general reputation for chastity of the defendant in an action for seduction is admissible. Hein v. Holdridge, 78 Minn. 468, 81 N. W. Rep. 522.

[1] Russell v. Chambers. 31 Minn. 54, 16 N. W. Rep. 458; Sellars v. Kinder, 1 Head, 133; Pruitt v. Cox, 21 Ind. 15.

[2] Long v. Booe, 106 Ala. 570, 17 So. Rep. 716.

[3] Id.; Cross v. Grant, 62 N. H. 675, 13 Am. St. 607.

[4] Hutchins v. Kimmel, 31 Mich. 126, 18 Am. Rep. 164; Browning v. Jones, 52 Ill. App. 597.

[5] Wood v. Mathews, 47 Iowa, 409; Prettyman v. Williamson, 1 Pennewill, 224, 39 Atl. Rep. 731; Evans v. O'Connor, 174 Mass. 287, 54 N. E. Rep. 557.

[6] Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. Rep. 654, 38 Am. Rep. 260.

[7] Wales v. Miner, 89 Ind. 118.

[8] Macdonald v. Macdonald, 12 Rettie (Scotch), 1327; Verholf v. Van Houwenlengen, 21 Iowa, 429; Sikes v. Tippins, 85 Ga. 231, 11 S. E. Rep. 662; Stumm v. Hummell, 39 Iowa, 483; Smith v. Meyers, 52 Neb. 70, 71 N. W. Rep. 1006.

[9] Bailey v. King, 27 Ont. App. 703; Winter v. Henn, 4 C. & P. 494; Evans v. Evans, [1899] Prob. 195.

jury, and the same considerations prevail in their assessment as when they are awarded in favor of a plaintiff who can feel the dishonor of other seductions;[1] courts will seldom set aside verdicts for excess.[2] The pecuniary ability of the defendant to respond in damages may be proved.[3] There are also other and peculiar considerations which will enter into the account.[4]

[1] A verdict in favor of the plaintiff, though it is silent as to compensatory damages, if it awards exemplary damages may be corrected by order of the court so as to carry nominal damages. Mills v. Taylor, 85 Mo. App. 111.

[2] Johnson v. Allen, 100 N. C. 131, 5 S. E. Rep. 666; Wales v. Miner, 89 Ind. 118; Sikes v. Tippins, *supra;* Torre v. Summers, 2 Nott & McC. 367; Johnston v. Disbrow, 47 Mich. 59, 10 N. W. Rep. 79; Wilford v. Berkeley, 1 Burr. 609; Duberly v. Gunning, 4 T. R. 657; Long v. Booe, 106 Ala. 570, 17 So. Rep. 716; Prettyman v. Williamson, 1 Pennewill, 224, 39 Atl. Rep. 736; Browning v. Jones, 52 Ill. App. 597; Puth v. Zimbleman, 99 Iowa, 641, 68 N. W. Rep. 895; Dorman v. Sebree, 21 Ky. L. Rep. 634, 52 S. W. Rep. 809; Smith v. Meyers, 52 Neb. 70, 71 N. W. Rep. 1006; Matheis v. Mazet, 164 Pa. 580, 30 Atl. Rep. 434; Speck v. Gray, 14 Wash. 589, 45 Pac. Rep. 143.

[3] Prettyman v. Williamson, *supra;* Matheis v. Mazet, 164 Pa. 580, 30 Atl. Rep. 434.

[4] The action lies in this case for the injury done to the husband in alienating his wife's affections, destroying the comfort had from her company, and raising children for him to support and provide for; and as the injury is great, so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case. The rank and quality of the plaintiff; the condition of the defendant, his being a friend, relative or dependent of the plaintiff; or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always borne a good character till then; and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation. Buller's N. P. 27; Mayne on Dam. (Wood's ed.) 664.

The extent of the injury in any case must depend in a great measure upon the previous relations of the parties. If these were cordial and affectionate, and such as are expected to exist when a suitable marriage has been formed, under a proper sense of the obligations and responsibilities that belong to it, the wrong of the seducer who succeeds in withdrawing the wife's affections from her husband, and induces her to live with him a life of shame, it is impossible adequately to measure. If, on the other hand, the husband was a libertine, and has brought shame upon his family by his own notorious misconduct, and if the wife, after the destruction of her affection, by his own abuse and misconduct, has finally surrendered her own honor, it is difficult to understand what claim he can have to legal consideration. And between these extreme cases there may be numerous others differing so widely in their facts, that, while it may be wise to give a right of action in all, yet the measure of redress must be

[745] Evidence in mitigation will be received which tends to show that the plaintiff has in fact suffered less injury than would otherwise be a probable inference from the act proved. It is proper to show unhappy relations between him and his wife, or that he was wanting in affection for her,[1] or that there was but slight intercourse between them;[2] that he was unkind in his treatment of her, or guilty of infidelities,[3] or negligently suffered her to encounter temptation,[4] or that the parties were divorced.[5] The loss to the plaintiff may be greatly mitigated by showing that the wife was of bad character at the time of the alleged wrong. It may be shown that there had been improper familiarities between her and other men,[6] that she was wanting in chastity before her marriage,[7] or had committed adultery afterwards,[8] and the fact that the defendant was solicited by her will also go in mitigation.[9] The consent of the husband to the act complained of bars his right to an action.[10] If there was no seduction, but the fall of the wife was the result of her own licentiousness, damages for the seduction cannot be recovered.[11] But the consent of the wife to the adultery does not bar the husband's right to recover for the loss of the *consortium* with her which is implied from the adultery.[12]

The right of a wife to maintain an action against those who

left largely to the discretion of the proper legal tribunal, which shall be at liberty to award much or little according as they find that much or little has been lost by the complaining party. Cooley on Torts, 224.

[1] Hadley v. Heywood, 121 Mass. 236; Coleman v. White, 43 Ind. 429; Billings v. Albright, 66 App. Div. 239, 73 N. Y. Supp. 22; Rudd v. Rounds, 64 Vt. 432, 25 Atl. Rep. 438; Bromley v. Wallace, 4 Esp. 237; Prettyman v. Williamson, 1 Pennewill, 224, 39 Atl. Rep. 736; Browning v. Jones, 52 Ill. App. 597; Peek v. Traylor, 17 Ky. L. Rep. 1312, 34 S. W. Rep. 705.

[2] Calcraft v. Harborough, 4 C. & P. 499.

[3] Norton v. Warner, 9 Conn. 172; Bromley v. Wallace, 4 Esp. 237; Browning v. Jones, 52 Ill. App. 597; Cross v. Grant, 62 N. H. 675, 13 Am. St. 607; Billings v. Albright, 66 App. Div. 239, 73 N. Y. Supp. 22.

[4] Calcraft v. Harborough, *supra;* Duberley v. Gunning, 4 T. R. 657; Van Vacter v. McKillip, 7 Blackf. 598; Bunnell v. Greathead, 49 Barb. 106; Pierce v. Pierce, 3 Pick. 299; Peek v. Traylor, 17 Ky. L. Rep. 1312, 34 S. W. Rep. 705.

[5] Prettyman v. Williamson, 1 Pennewill, 224, 39 Atl. Rep. 736.

[6] Norton v. Warner, 9 Conn. 172.

[7] Conway v. Nicol, 34 Iowa, 533.

[8] Winter v. Henn, 4 C. & P. 494.

[9] Elsam v. Faucett, 2 Esp. 562.

[10] Prettyman v. Williamson, *supra.*

[11] Hoggins v. Coad, 58 Ill. App. 58.

[12] Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307.

wrongfully and wilfully alienate the affections of her husband from her is not everywhere admitted, and in some states in which the right exists it is dependent upon statutes. Where the action may be maintained it can be done by the wife alone, without joining her husband; and it is not a reason for denying her a remedy that she is living with him.[1] The damages recovered become her property.[2] The alienation of the affections of the husband is often the means by which his separation from his wife is effected; that, however, is not essential to her cause of action. The wife is entitled to the aid, support, protection, comfort and society of her husband, and may recover for the loss thereof by the wrongful act of a third party, though the husband may continue to have affection for her.[3] "A husband makes a *prima facie* case against a stranger when he shows that such stranger voluntarily and unasked intermeddled with his domestic affairs, and intentionally urged, persuaded and induced his wife to desert and abandon him, and to refuse to live with him; and in the absence of anything in the evidence to justify or excuse such conduct, the plaintiff's right to a recovery, upon proof of such facts, is established."[4] There may be liability for a partial alienation of the affection of a wife; and even if there was no affection a stranger has no right to interfere and cut off all chance of its springing up.[5]

If the action is against the parents or either of them of the consort the intent is material in determining liability. A parent has the right to advise his child, and in so doing, in good faith and with a proper motive, he is not to be regarded as a mere intermeddler. "A clear case of want of justification on the part of the parents should be shown before they should be held responsible."[6] The relations of the husband and wife to each other should have a material influence on the amount of damages. If the plaintiff's wife had reached the crisis "when love

[1] Foot v. Card, 58 Conn. 1, 18 Am. St. 258, 6 L. R. A. 829, 18 Atl. Rep. 1027; Van Olinda v. Hall, 88 Hun, 452, 34 N. Y. Supp. 777.

[2] Foot v. Card, *supra*.

[3] Nichols v. Nichols, 147 Mo. 387, 401, 48 S. W. Rep. 947.

[4] Hartpence v. Rogers, 143 Mo. 623, 632, 45 S. W. Rep. 650.

[5] Dallas v. Sellers, 17 Ind. 479, 79 Am. Dec. 489; Fratini v. Caslini, 66 Vt. 273, 29 Atl. Rep. 252.

[6] Gernerd v. Gernerd, 185 Pa. 233, 39 Atl. Rep. 884, 64 Am. St. 646, 44 L. R. A. 549, and cases cited in opinion.

begins to sicken and decay" his recovery cannot be as large as if the condition was otherwise.[1] Evidence as to the state of the plaintiff's feeling toward his wife must be limited to the time previous to her association with the defendant.[2] In the absence of the aggravation of criminal conversation the relations which existed between the wife and husband may be proven for the purpose of showing his damage.[3] This is measured by the value of her services and marital consort, less the value of the performance of the husband's duty to support, clothe and care for her.[4] The loss of the comfort, society and service of the wife is to be compensated for.[5] Damages may be allowed as smart money in the discretion of the jury under circumstances which permit their recovery in other tort actions.[6] It may be shown that the defendant attempted to use the influence of her property to effect the alienation, and to show in connection with that fact the amount of the property.[7] Under a statute allowing the recovery of punitive damages for a wrong done to the person, one who has intentionally or wilfully, without justification, alienated the affections of a husband from his wife may be liable for such damages.[8] The amount of the damages is in the discretion of the jury, which will not be reviewed unless there is reason to believe that it has been abused.[9]

Where the action is by the wife for the alienation of the affections of the husband, her occupation may be shown, and perhaps her social position as well as his, as bearing upon the value of the latter's *consortium;* but the wealth, rank,

[1] Bathke v. Krassin, 78 Minn. 272, 80 N. W. Rep. 950; Van Olinda v. Hall, 88 Hun, 452, 34 N. Y. Supp. 777; Rudd v. Rounds, 64 Vt. 432, 25 Atl. Rep. 438.

[2] Fratini v. Caslini, 66 Vt. 273, 29 Atl. Rep. 252.

[3] Derham v. Derham, 125 Mich. 109, 83 N. W. Rep. 1005; Millspaugh v. Potter, 62 App. Div. 521, 71 N. Y. Supp. 134.

[4] Rudd v. Rounds, 64 Vt. 432, 25 Atl. Rep. 438.

[5] Hartpence v. Rogers, 143 Mo. 623, 635, 45 S. W. Rep. 650; Nichols v. Nichols, 147 Mo. 387, 401, 48 S. W. Rep. 947; Wilson v. Coulter, 29 App. Div. 85, 51 N. Y. Supp. 804; Knapp v. Wing, 72 Vt. 334, 47 Atl. Rep. 1075; Reading v. Gazzam, 200 Pa. 70, 106, 49 Atl. Rep. 889.

[6] Hartpence v. Rogers, 143 Mo. 623, 635, 45 S. W. Rep. 650; Nichols v. Nichols, 147 Mo. 387, 404, 48 S. W. Rep. 947.

[7] Knapp v. Wing, *supra.*

[8] Williams v. Williams, 20 Colo. 51, 67, 37 Pac. Rep. 614.

[9] Hartpence v. Rogers, 143 Mo. 623, 638, 45 S. W. Rep. 650.

social position or condition of the defendant is immaterial.[1] If punitive damages may be recovered the wealth of the defendant may be shown,[2] but not his reputed wealth.[3] The plaintiff wife may prove the cost of her separate maintenance if the evidence tends to show the husband's ability to support her.[4] The value of property transferred by her husband is to be regarded.[5] If the conveyance was made to the defendant without consideration and he has since enjoyed it the facts are material as bearing upon his intent to deprive the plaintiff of all means of support out of the property of her husband, and as tending to show that the defendant was interested in separating the husband from his wife. It may also be shown that by reason of such conveyance the plaintiff had not recovered anything under a judgment of separation obtained against her husband for alimony or costs.[6] Mental anguish, mortification and injured feelings must be compensated for;[7] and if proof has been made of the social standing and character of the parties, and the circumstances surrounding the wrong done there is a sufficient basis for awarding damages.[8] The effects of mental suffering may be proven, as that it resulted in physical suffering, which produced a miscarriage. "This was competent evidence as tending to show the effect of defendant's conduct upon her health, and was proper for the consideration of the jury, in case they found that the miscarriage was the direct result of such conduct, upon the question of damages in connection with the wilful misconduct of the defendants in alienating the husband's affections from his wife and causing him to separate from her."[9] It may be proven in mitigation of damages that the plaintiff had been guilty of improper relations with a certain man, whether her husband had knowledge thereof or not.[10]

[1] Bailey v. Bailey, 94 Iowa, 598, 606, 63 N. W. Rep. 341.

[2] Nichols v. Nichols, 147 Mo. 387, 404, 48 S. W. Rep. 947.

[3] Derham v. Derham, 125 Mich. 109, 83 N. W. Rep. 1005.

[4] Bowersox v. Bowersox, 115 Mich. 24, 72 N. W. Rep. 986.

[5] Williams v. Williams, 20 Colo. 51, 68, 37 Pac. Rep. 614.

[6] Wilson v. Coulter, 29 App. Div. 85, 90, 51 N. Y. Supp. 804.

[7] Hartpence v. Rogers, 143 Mo. 623, 45 S. W. Rep. 650.

[8] Rice v. Rice, 104 Mich. 371, 381, 62 N. W. Rep. 833.

[9] Lockwood v. Lockwood, 67 Minn. 476, 492, 70 N. W. Rep. 784.

[10] Wolf v. Frank, 92 Md. 138, 145, 48 Atl. Rep. 132.

CHAPTER XXXIX.

DAMAGES FOR TORTS IN ADMIRALTY.

§ 1286. Fundamental difference between liability in admiralty and at common law.
1287. Division of loss in collision cases.
1288. Rule applicable to other torts.
1289. Liability confined to proximate loss.
1290. Total loss; elements of damage.
1291. Total loss, what is.
1292. Partial loss; elements of damage.
1293. Same subject.
1294. Interest.
1295. Mitigation of liability.
1296. Recovery by owner of cargo.

§ 1286. Fundamental difference between liability in admiralty and at common law. At common law a party injured by the act or neglect of another is entitled to recover such a sum as will place him in as good condition as though the wrong had not occurred. If his own conduct contributed to produce the result of which he complains he cannot obtain redress.[1] The civil law is in harmony with the common law on this proposition. The reason for the rule is said to be based upon grounds of public policy, which requires, in the interest of the whole community, that every one shall take such care of himself as can reasonably be expected. There is another and more commonly assigned reason for regarding contributory negligence as a defense instead of as a mitigation of damages — the law has no scales to determine whose wrongdoing was the most potent factor in causing the mischief. In courts of admiralty the rule is different. As between the parties to the wrong complained of the loss resulting from a collision will be divided in three classes of cases: first, when there is no fault on either side; second, when the fault is inscrutable; and third, when both parties are in fault.[2] This rule of apportionment emanated from the ancient maritime codes. Exemplary damages are not recoverable in a suit *in*

[1] Belden v. Chase, 150 U. S. 674, 691, 14 Sup. Ct. Rep. 264.
[2] Cohen's Admiralty, 229.

rem against a vessel for a maritime tort.[1] A claim therefor was disallowed for the forcible detention of possession of a tug by her charterers after a breach of their contract, where that was done under legal advice.[2]

§ 1287. **Division of loss in collision cases.** "The rule of admiralty in collision cases, as we understand it," said Justice Bradley, "is that where both vessels are in fault they must bear the damage in equal parts — the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses sustained."[3] The judge further said: "But when claims are prosecuted judicially, the courts regard the pleadings, and the English courts are very strict in holding the parties to their allegations, and in refusing relief unless it is sought in a direct mode.[4] If only one party sues, and the other merely defends the suit, and upon the proofs it appears that both parties are in fault, the court declares this fact in the decree, and decrees to the libelant one-half of the damage sustained by him — the damage sustained by the respondent not being regarded as the subject of investigation determinable in that suit. This technical result of the form of proceedings and pleadings, in which the respondent suffers himself to be placed in a position of disadvantage, has led to the erroneous notion that each party is entitled by the law to be paid one-half of his damage by the other party, and that each claim is independent of the other. But where both parties file libels, as they are entitled to do, although, to conform to the pleadings, a decree may be rendered in each suit in favor of the libelant for one-half of his damage, even the English courts will not allow two executions, but will grant a monition in favor of that party who has sustained most damage for the balance necessary to make the division of damages equal."[5] In this country if both parties file libels the suits will

[1] The William H. Bailey, 103 Fed. Rep. 799.

[2] The Mascotte, 72 Fed. Rep. 684.

[3] The North Star, 106 U. S. 17, 20, citing The Catharine v. Dickinson, 17 How. 170 (which case first established the rule for the supreme court of the United States), and other cases confirmatory of it; The Conemaugh, 189 U. S. 363, 23 Sup. Ct. Rep. 504; The Chattahoochee, 74 Fed. Rep. 899, 21 C. C. A. 162, 173 U. S. 540, 19 Sup. Ct. Rep. 491; The Manitoba, 122 U. S. 97, 7 Sup. Ct. Rep. 1158.

[4] See The Itasca, 117 Fed. Rep. 885.

[5] The North Star, *supra*.

be consolidated and the decree will pronounce for one-half of the difference of the damage sustained by the two vessels.[1] Where the injury results from the combined negligence of two or more[2] vessels the damages should be apportioned equally between them, the right being reserved to the libelant to collect the entire amount from either of them to the extent of her stipulated value, in case of the inability of the other to respond for her portion.[3]

The rule of equal liability is sometimes varied, as where there is mutual fault, the fault of one vessel being much greater than that of the other. In such a case, as between the cargo owner and the vessels, the entire proceeds of the one most at fault would be devoted to making good the loss, and the other vessel will be liable for any deficiency.[4] Where the rule of equal liability governs it cannot be evaded by the purchase at a discount of claims for injuries to cargo by the agents of one of the vessels. In adjusting their liabilities such claims will be allowed at the sum paid, with interest.[5] On a libel for the loss of a vessel and cargo, a division of the damages having been decreed, if one of the parties, pending suit, buys the claims of the cargo owners he can recover from the other only for his proportion of the sum paid, with interest thereon.[6] The fact that one of the vessels at fault cannot be brought before the court because without the jurisdiction does not affect the right of the libeled vessel, which has paid all the damages, to be subrogated to the rights of the original damage claimant and to bring an independent suit against the other to establish her liability also, and to enforce contribution.[7] The Harter act[8] has no application in case of a collision by mutual fault, whereby one vessel and her cargo are totally lost, so as to

The rule declared in The North Star is the same as that established in the house of lords a very short time before that case was decided. Stoomvaart Maatschappy Nederland v. Peninsular & Oriental Steam Navigation Co., L. R. 7 App. Cas. 795 (July, 1882).

[1] Id.

[2] The S. A. McCauley, 116 Fed. Rep. 107, modifying s. c., 110 id. 227.

[3] The Sterling and The Equator, 106 U. S. 647.

[4] The Victory, 68 Fed. Rep. 395, 15 C. C. A. 490.

[5] The Gulf Stream, 58 Fed. Rep. 604, 64 id. 809, 12 C. C. A. 613.

[6] Id.

[7] The Mariska, 107 Fed. Rep. 989, 47 C. C. A. 115.

[8] 27 U. S. Stats. 445.

prevent the operation of the general rule allowing the other vessel, after paying the entire value of the cargo, to recoup one-half of that amount out of the half of the damages awarded to the owners of the lost vessel.[1]

§ 1288. Rule applicable to other torts. If a person injured by a tort which is cognizable in the common-law courts brings his suit to recover therefor in a court of admiralty which has jurisdiction he elects to be compensated according to the rule there prevailing; and if his fault contributed to the wrong of which he complains he must be content with the recovery of a moiety of the damages resulting from it.[2] Where seamen are injured by the fault of the vessel on which they are serving and the co-operating fault of another vessel their recovery against the latter cannot exceed one-half their loss; the other half must be borne by themselves, inasmuch as they cannot claim compensation against their employer for an injury resulting from their own neglect.[3] As to passengers, shippers or consignees the measure of compensation for any wrong or breach of contract is damages to the amount of the whole loss sustained; being innocent of all wrong, they bear no proportion of the loss resulting from a collision.[4] The master of a tug is a common-law bailee of a tow in his charge, and may recover its full value against another vessel which collides with the tow and causes its loss.[5] It is otherwise as to the charterer of a vessel for a fixed sum, he paying all her expenses and having full control and management. Her contributory fault is imputed to him.[6] While the damages done to a scow being

[1] The Chattahoochee, 74 Fed. Rep. 899, 21 C. C. A. 162, 173 U. S. 540, 19 Sup. Ct. Rep. 491. See The Viola, 60 Fed. Rep. 296.

[2] Atlee v. Northwestern Union Packet Co., 21 Wall. 389; McCord v. The Tiber, 6 Biss. 409; The Queen, 40 Fed. Rep. 694, applying the rule to a case of personal injuries.

[3] The Queen, 40 Fed. Rep. 694; Jakobsen v. Springer, 87 Fed. Rep. 953, 31 C. C. A. 315; The Livingstone, 104 Fed. Rep. 918; Wm. Johnson & Co. v. Johansen, 86 Fed. Rep. 886, 30 C. C. A. 675; The Eddystone, 33 Fed. Rep. 925; Olson v. Flavel, 34 id. 477; The City of Norwalk, 55 Fed. Rep. 98; The Job T. Wilson, 84 id. 204, 208; The Transfer No. 4, 61 id. 336, 9 C. C. A. 520; In re Lakeland Transportation Co., 103 Fed. Rep. 328.

[4] The Atlas, 93 U. S. 302; The Victory, 68 Fed. Rep. 395, 15 C. C. A. 490; The Virginia Ehrman and The Agnese, 97 U. S. 316. See § 1296.

[5] The Jersey City, 51 Fed. Rep. 527, 2 C. C. A. 365; The Mercedes, 108 Fed. Rep. 559.

[6] The Livingstone, 104 Fed. Rep. 918, reversed on other questions, 113 id. 879, 51 C. C. A. 560.

towed by a tug, the owner being an innocent sufferer, are primarily chargeable in equal parts to the tug and the vessel which collided with her, if the owner of the scow is unable to obtain the sum charged against either, he may compel the other to pay the whole.[1] The provisions of the Harter act do not affect the operation of the equitable rule which gives priority to the claim of the innocent cargo owners over that of the vessel owner against the fund available for the payment of damages sustained through a collision brought about by mutual fault.[2]

§ 1289. Liability confined to proximate loss. The liability in admiralty for the consequences of a collision is not more extended than in the common-law courts in cases of other torts. The wrong-doer must respond for all the direct injury which follows his wrongful act or culpable neglect; but he is not liable for anything beyond the direct consequences.[3] Where a boat engaged in transporting ice was so aged as to be too weak to stand the wear and tear, it was ruled that for an injury to her, which caused the loss of her cargo, the party in fault was liable only to the extent that damage would have resulted from his act if the boat affected by it had been ordinarily fit for the business in which it was engaged.[4] If a collision deprives the master of a ship of his compass, chart and log-line, thereby rendering it difficult if not impossible for him to know his exact whereabouts, and he judiciously undertakes to reach a place of safety, and is not chargeable with negligence in his attempt to do so, the wrong-doer is liable for the consequences, as the abandonment of the vessel made necessary by her becoming grounded. Depriving the vessel's officers of the means of averting such an accident is the proximate cause of the resulting loss.[5] If personal injuries result from a collision they may be recovered for,[6] and so may the damage resulting from the loss of life.[7] The latter cause of action may be recovered for in a proceeding *in rem* against the vessel respon-

[1] The Job T. Wilson, 84 Fed. Rep. 204.

[2] The George W. Roby, 111 Fed. Rep. 601, 49 C. C. A. 481.

[3] The John H. May, 53 Fed. Rep. 664.

[4] Mould v. The New York, 40 Fed. Rep. 900. See Gilkey v. The Beta, 44 id. 389.

[5] The City of Lincoln, 15 Prob. Div. 15.

[6] The George and Richard, L. R. 3 Adm. 466.

[7] Id.; The Sea Gull, Chase's Dec. 145.

sible for it.[1] In a recent English case in which the collision had previously been adjudged to be owing to the mutual fault of two vessels there was added to a moiety of the plaintiffs' claim, payable by the defendants, a moiety of the amount of damage recovered from the plaintiffs by the owners of a barge against which the plaintiffs' vessel was driven in consequence of the collision. It was contended that, as the parties were joint tort-feasors, no contribution could be claimed from the defendants in respect of the damage to the barge paid by the plaintiffs. This contention was overruled, and it was held that liability for such consequential damage existed, notwithstanding it arose out of a tort.[2] The expense incurred in replacing papers lost by a libelant in a collision is too remote to be an element of damage.[3] Under the maritime law a seaman who is injured while in the service of his ship is entitled to medical care, nursing and attendance, and to a cure, so far as a cure is possible, at the expense of the ship. The duty devolves upon the master of the vessel to take all reasonable measures to that end; for his neglect in that behalf her owners are responsible. If neglect of such duty results in increasing the pain of the injured seaman and renders a temporary injury permanent he may recover therefor, though but for such neglect the liability of the owners would be limited as stated.[4]

§ 1290. Total loss; elements of damage. If a vessel is completely lost the libelant is entitled to have restored to him such an one as he has been deprived of. It was said where there was a loss of a French fishing brig of the kind French fishermen are willing to use for their business, and such as are constantly built in France for that purpose, that the fact that vessels of the same tonnage, which English and American fishermen consider superior to the French vessels, could be built or purchased for a considerably less sum in England or the United States was immaterial, in view of the fact that there was a regular market price in France for vessels like the one lost.[5] Where there was a total loss of an expensive

[1] The Sea Gull, Chase's Dec. 145.

[2] The Frankland, [1901] Prob. 161.

[3] Jacobsen v. Dalles, P. & A. Nav. Co., 93 Fed. Rep. 975.

[4] Whitney v. Olsen, 108 Fed. Rep. 292, 47 C. C. A. 331.

[5] Guibert v. British Ship George Bell, 3 Fed. Rep. 581. See The Colorado, Brown, 411.

pleasure yacht, for which there was no established market value, the court said that her original cost, her condition at the time of the loss and the sum for which the plaintiff could have got such another yacht built, were important matters in the calculation. Another inquiry of practical value would be, what amount any person of sufficient means, desiring to acquire a yacht of her size and character, might reasonably be expected to be willing to pay for the same rather than incur the cost of a new structure, considering, nevertheless, the inducements to secure the new by reason of the probable improvements and the other advantages which the new offers.[1] The test of the value of a vessel, in the absence of a market value, is what she was fairly worth to her owners from a business point of view.[2]

It has been held that the value of the property lost at the time of its destruction affords full indemnity to the owners of it, and that there cannot be a recovery for lost freights or the contingent profits which the master of a vessel might realize from the allowances made to him upon the voyage.[3] All the adjudications have not held to this great strictness. Where a smack was negligently run down while performing salvage service her value was recovered and also damages for the loss of the anticipated salvage reward.[4] In a later English case than is referred to in note three the principle is said to be well established to allow the gross freight, less the expense which would have been incurred in earning it.[5] Where the vessel lost was without cargo, but was under charter, the profits under the charter-party, rather than interest on her value at the end of the journey, more accurately represented the loss to the owner, and was considered to be the equivalent of freight when a cargo is on board.[6] In this country the admiralty courts do not recognize any distinction between cases of partial and total loss in determining the damages which may be recovered for a collision. In both classes of cases they allow as part of the damages the net freight which the vessel was in

[1] The H. F. Dimock, 77 Fed. Rep. 226, 23 C. C. A. 123. See La Normandie, 58 Fed. Rep. 427, 7 C. C. A. 285.

[2] The Harmonides, [1903] Prob. 1.

[3] The Columbus, 3 W. Rob. 164 (1849).

[4] The Betsey Carnes, 2 Hagg. 28.

[5] The Canada, Lush. 584 (1860).

[6] The Kate, [1899] 1 Prob. 165, 174.

process of earning at the time of her loss.[1] The rule has been applied, though it has recently been dissented from,[2] where a vessel was chartered for a fixed time and was wholly lost while engaged in the performance of the contract.[3] In the case last cited compensation was allowed for the loss of a verbal charter for the season which embraced many trips subsequent to the one on which the collision occurred. Judge Lowell stated that his ruling was "an advance upon the decisions," and Judge Brown has observed of it that "no other similar case in this country or in England is found."[4] The rule which permits the recovery of the net value of an existing charter rests upon the ground that the loss of the vessel is necessarily followed by a loss of the profits it would have made, because the charterer could not be obliged to accept performance of his contract by the employment of any other than the stipulated vessel. Hence the rule stated does not apply where the contract provides for the accomplishment of results and leaves the contractor at liberty to use any instrumentalities he sees fit.[5]

There has arisen some difference of opinion as to the right to recover net freight which would have been earned by the lost vessel under a charter-party which she had not entered upon.[6] But that question has been put at rest by the supreme court of the United States. Brown, J., said for the court: The probable net profits of a charter may be considered in cases of delay, occasioned by a partial loss, where the question is as to the value of the use of the vessel pending her

[1] The Rebecca, 1 Blatch. & H. 356; The Baltimore, 8 Wall. 386; The Hope, 5 Fed. Rep. 822; The Minnie, 26 id. 860.

[2] The George W. Roby, 111 Fed. Rep. 601, 49 C. C. A. 481, 495; The Fontana, 119 Fed. Rep. 853, 56 C. C. A. 365. In the last case there was a recovery of interest on the value of the vessel and her pending freight.

[3] The Hope, 5 Fed. Rep. 822; The Freddie L. Porter, 8 id. 170. Compare The Amiable Nancy, 3 Wheat. 546.

[4] The City of Alexandria, 40 Fed. Rep. 697.

[5] Id.; The North Star, 44 Fed. Rep. 492. In the last case a steamer was sunk after she had entered upon the performance of her charter. Her owner was paid a considerable sum for a re-assignment and release of his interest in the charter on the theory that he had the right to substitute another vessel. On that consideration it was held that he could not recover the profits which would have accrued to him from a complete performance of the charter.

[6] The Iberia, 46 Fed. Rep. 301.

repairs. . . . But in cases of total loss the probable profits of a charter not yet entered upon are always rejected.[1] . . . In cases of a partial loss there is no injustice in allowing the probable profits of a charter for the short time during which the vessel is laid up for repairs; but in cases of a total loss the recovery of such profits is limited to the voyage which the vessel is then performing, since, if the owner were entitled to recover the profits of a future voyage or charter, there would seem to be no limit to such right so far as respects the time of its continuance, and if the vessel were under a charter which had months or years to run the allowance of the probable profits of such charter might work a great practical injustice to the owner of the vessel causing the injury.[2]

There cannot be a recovery for lost freight when the vessel is wholly laden with her owner's goods at the time of the collision because of the rule which confines the recovery of the shipper to the value of the cargo at the place of shipment. Brown, J., said: "The compensation for which the shipowners look in the employment of their vessel to carry their own goods is solely in the expectation of the enhanced value of the goods at the place of discharge; and if that expectation of enhanced value cannot be considered in determining the owner's loss on the goods, I do not see how it can be any more considered as regards the loss of the ship, either directly or indirectly. Nor is that necessary; nor is the supposition of a fictitious charter necessary in order to satisfy the rule of *restitutio in integrum*. That rule will be fully satisfied by allowing to the libelants, as in the case of goods wholly lost at sea, the market value of their vessel at the port of sailing at the time she was devoted to the voyage, with interest from that date; and, in addition thereto, whatever stores or special equipment of any kind may have been provided for the voyage, including the wages of officers and men from the time they were engaged, as well as any other items of expense, if any, reasonably incurred for the prosecution of the voyage up to

[1] Citing The Amiable Nancy, 3 Wheat. 546.

[2] The Umbria, 166 U. S. 404, 421, 16 Sup. Ct. Rep. 610; Faber v. Cunard Steamship Co., 53 Fed. Rep. 288, 3 C. C. A. 534; The Hamilton, 95 Fed. Rep. 844; In re Lakeland Transportation Co., 103 id. 328.

the time of loss, with interest on such sums from the time they were supplied or paid."[1]

In proving the value of a vessel it may be shown, as an element thereof, that she would have been able to earn a bounty under the law of her nationality; but, there cannot be a recovery for the loss of the bounty.[2] To the full value at the time she sunk there may be added the cost of raising her if that is necessary in order to ascertain whether she should be abandoned as a total loss or repaired.[3]

§ 1291. Total loss, what is. The fact that a vessel sinks after a collision does not of itself warrant the conclusion, as a matter of legal judgment, that either she or her cargo is a total loss.[4] If it appears probable that they may be raised without much expense and the vessel repaired, her owners cannot insist upon compensation as for a total loss if they have neglected to employ reasonable measures to mitigate the damage. In some cases allowance has been made for the cost of raising a sunken vessel though she was not repaired. This course has been taken when it was necessary to raise her in order to ascertain whether she should be abandoned as a total loss or not, and also when her removal was required because she was an obstruction to navigation.[5] In all these cases the vessels were sunk in rivers or harbors or in comparatively shallow water elsewhere. If the sunken vessel lies in deep water and was of comparatively little value before the collision, her owner cannot incur large expense in raising her and charge the vessel in fault with it, and also with the cost of repairs, freight, demurrage and value of the cargo. In such a case the recovery will be limited to the value of the vessel, cargo, freight and personal effects before the collision occurred.[6] It is said in The Granite State[7] that there cannot be an estab-

[1] The Beatrice Havener, 50 Fed. Rep. 232.

[2] Febre v. Cunard Steamship Co., 53 Fed. Rep. 288, 3 C. C. A. 534.

[3] The Venus, 17 Fed. Rep. 926; The Oneida, 84 id. 716.

[4] The Baltimore, 8 Wall. 377; The Bristol, 10 Blatch. 537; The Thomas P. Way, 28 Fed. Rep. 526; The Havilah, 50 id. 331; The Granite State, 3 Wall. 310; The Ernest A. Hamill, 100 Fed. Rep. 509.

[5] The Empress Eugenie, Lush. 139; The Venus, 17 Fed. Rep. 925; The America, 11 Blatch. 485; The Mary Eveline, 14 id. 497; The Nebraska, 3 Bene. 261.

[6] The Havilah, 50 Fed. Rep. 331, 1 C. C. A. 519.

[7] 3 Wall. 410.

lished market value for barges, boats and other articles of that description as in cases of grain, cotton or stock. The value of such a boat depends upon the accidents of its form, age and materials; and as these differ in each individual, there could be no such value. A person may make considerable profits by the use of an old hulk of little value in the market for vessels. His loss cannot be measured by the ratio of her profits, as he might supply himself with another at a cheaper rate. But when the injured vessel is not a total loss, and is capable of being repaired and restored to her original situation, the cost necessary to such repair cannot be said to be an incorrect rule of damages. Where the vessel was sunk in the ocean, the water being thirteen fathoms deep, after a blow by the bow of a steamer which cut into her port side and penetrated about half way through her, and one wrecking company declined to undertake to raise her, and another refused to do so for any percentage of her value when raised, but offered to make the effort for $3,000 contingent upon success and without regard to the value of the vessel as saved, a finding of a total loss was approved.[1]

§ 1292. **Partial loss; elements of damage.** If a damaged vessel has been repaired the measure of damages is not the difference between her value in her crippled condition and before the collision, but the cost of repairing and getting her in condition to be repaired,[2] though the repairs may put her in better condition than she was in before the injury.[3] The rule is *restitutio in integrum.* Because that rule is a profitable one to the owner of an injured vessel it is not to be extended beyond the requirement of the necessities of the case. He cannot recover for the increased cost of repairs caused by the fact that, on opening up the vessel, parts adjacent to those parts injured by the collision, and not directly involved therein, are found to be unsound, so that, on that account, the cost of repairing the part injured is increased over what it would have been if the adjacent parts had been sound. There may be instances, said the court, where adjacent parts which are un-

[1] La Normandie, 58 Fed. Rep. 427, 7 C. C. A. 285.

[2] The Schooner Catharine v. Dickinson, 17 How. 170; Union Ice Co. v. Crowell, 55 Fed. Rep. 87, 5 C. C. A. 49.

[3] The John H. Starin, 116 Fed. Rep. 433.

sound are so closely connected with the parts directly injured by the collision that they cannot be distinguished in making repairs, so that repairs of all the parts amount only to repairs of a single whole; but in order to establish a proposition of that kind, and thus enlarge the field of application of the rule of *restitutio in integrum*, the facts should be very clear and strong.[1] The reasonable value of the repairs made, and not the amount paid therefor, is the rule of damages, especially if there has been negligence in not procuring surveys on notice and in ascertaining the probable damages before accepting the only bid for making the repairs.[2] The rule of liability for the cost of repairs has been disregarded where the damage done might be as well attributable to the worn-out or rotten condition of the vessel as to the collision. Both vessels were treated as at fault, and the injured one recovered one-half the cost of the repairs.[3]

Demurrage can only be recovered when profits have actually been, or may reasonably be supposed to have been, lost, and the amount of such profits has been proved with reasonable certainty.[4] The English law on this point may not be harmonizable with the rule just stated. In a recent case in the house of lords a steam dredger was injured and its owners were deprived of the use of it for some weeks, and the works on which they were engaged were delayed. The dredger belonged to trustees who were charged with the duty of maintaining a harbor and waterway; their funds were derived from rates, and they were not entitled to distribute profits. It was held, reversing the court of appeal,[5] that though the trustees were not out of pocket in any definite sum they were entitled to recover damages for the loss of the use of the dredger. The ground upon which the court of appeal proceeded was that it was not shown that the plaintiffs had sustained any tangible pecuniary loss. The lord chancellor said: I am not quite certain that I understand what is meant by the use of

[1] The Providence, 98 Fed. Rep. 133, 38 C. C. A. 670.

[2] The Robert Hadden, 68 Fed. Rep. 1017.

[3] The John R. Penrose, 86 Fed. Rep. 696.

[4] The Conqueror, 166 U. S. 110, 125, 17 Sup. Ct. Rep. 510; The Saginaw, 95 Fed. Rep. 703; The Emerald, [1896] Prob. Div. 192.

[5] The Emerald, [1896] Prob. Div. 192.

the word "tangible." If by that is meant that, in order to entitle a plaintiff to recover, you must be able to show that during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle so affirmed would, as it appears to me, go very far beyond the particular case now before your lordships. But to my mind it is a principle for which there is no authority whatever. This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrong-doer.[1] As interpreted in a subsequent case[2] the principle here declared is that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages. In the case last cited a lightship was damaged in a collision caused by the negligence of the defendants. The place of the damaged ship was, during the time of her repair, taken by another ship which was maintained at an annual expense for the purpose of such emergency. It was held that the harbor board was entitled to recover not only the out-of-pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged ship during the time her place was taken by the substituted ship.

"In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. When there is a market price for such use that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but

[1] Owners of No. 7 Steam Sand Pump Dredger v. Owners of S. S. Greta Holme, [1897] App. Cas. 596.

[2] Owners of the Steamship Mediana v. Owners, Master & Crew of the Lightship Comet, [1900] App. Cas. 113; The Mediana, [1899] Prob. 127.

from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; in no event can more than the net profits be recovered by way of damages; and the burden is upon the libelant to prove the extent of the damages actually sustained by him."[1] The expenses of the vessel from the port of departure to the place of collision and return from thence to a port of repair have been disallowed on the theory that the voyage might not have been a profitable one.[2] There are cases which ignore some of the contingencies which may have influenced the court in ruling the proposition last stated. In an English case[3] the injured vessel was in ballast on a voyage from Antwerp to Montreal to load a cargo of grain. She collided with another vessel October 10, and was compelled to put into Queenstown for repairs. She was under a profitable charter, which her owners did not abandon until it became apparent to them that she could not be repaired in time to resume her voyage and enter upon the performance of her charter until after the time

[1] Mr. Justice Gray in The Potomac, 105 U. S. 630, 632, citing Williamson v. Barrett, 13 How. 101; Sturgis v. Clough, 1 Wall. 269; The Cayuga, 2 Bene, 125, 7 Blatch. 385, 14 Wall. 270; The Gazelle, 2 W. Rob. 279; The Clarence, 3 id. 283. To the same effect are The Umbria, 166 U. S. 404, 421, 16 Sup. Ct. Rep. 610; The Mayflower, Brown's Adm. 376; The Belgenland, 36 Fed. Rep. 504; The Gorgas, 10 Bene. 666; The Argenturo, 13 Prob. Div. 191, 14 App. Cas. 519; The Mary Steele, 2 Low. 370; The Armonia, 81 Fed. Rep. 227, 26 C. C. A. 338; La Champagne, 53 Fed. Rep. 398; The Bulgaria, 83 id. 312.

In the case before the court demurrage was allowed for the loss of three trips in the established trade of the vessel on the basis of the profits which according to the average of her whole business for the season she would have realized on that number of trips. This allowance was made, instead of the charter value of the vessel, because she was engaged in a regular established line for which she was peculiarly fitted, and her charter value could not be satisfactorily ascertained; neither could her place be supplied by a vessel equally fitted for the service. No deduction was made for insurance or for wear and tear or for necessary repairs at the end of the season. It did not appear that there was any need of repairs at the time of the collision, nor that there was any decrease in the cost of insurance while the repairs were being made. On these considerations a majority of the court were unable to say as matter of law that the damages were excessive. See The Margaret J. Sanford, 37 Fed. Rep. 148. The rule stated in the text is not applied in the courts of Ontario. Brown v. Beatty, 35 Up. Can. Q. B. 328.

[2] Memphis, etc. Packet Co. v. The H. C. Yaeger, 4 Fed. Rep. 927.

[3] The Consett, 5 Prob. Div. 229 (1880); The Argentino, 13 id. 61 (1888).

the St. Lawrence is usually closed for navigation. The abandonment of the charter being justifiable, it was ruled that the loss of the profit which would have accrued from its performance was a ground of damage in favor of the vessel owners. It has been pointed out[1] that there were several contingencies which made it uncertain whether, had no collision occurred, the charter would have been performed. There was the contingency in the first place of the vessel's ever reaching Montreal; and second, of her charterers being ready to furnish her with the stipulated cargo, and also whether she would accomplish the homeward voyage and earn her freight. It is essential to the right to recover dead freight as an item of damage that the vessel which has lost freight in consequence of a collision shall make reasonable efforts to secure a fresh cargo.[2] If an existing charter is lost in consequence of a collision and a charter at lower rates is necessarily taken for the residue of the charter period the vessel owner is entitled to compensation for the loss resulting up to the expiration of the original charter.[3] It is not a valid reason for refusing demurrage that its allowance, added to the cost of the repairs, will make a sum in excess of the value of the vessel before the collision, if the owners acted with care, skill, diligence and fidelity and in good faith in the course pursued, and the excess of the cost of repairs over the estimates could not have been foreseen.[4] Neither is it a sufficient reason for disallowing demurrage while a boat is detained for repairs that the work she would have been put to but for the accident was done by another boat owned by the libelants, and which was at the time not otherwise employed.[5] This ruling is said to be maintainable on the ground that the owners of the disabled boat were entitled to procure another boat to take her place. It is immaterial to the wrongdoer whether the boat substituted was hired from other persons at market rates or supplied by the libelants themselves. If the latter course is pursued they are entitled to charge for

[1] Per Fox, J., in The Hope, 5 Fed. Rep. 822.

[2] The C. P. Raymond, 28 Fed. Rep. 765.

[3] The Belgenland, 36 Fed. Rep. 504; The Star of India, 1 Prob. Div. 466; The Consett, 5 id. 229.

[4] The Glaucus, 1 Low. 366, 372.

[5] Coffin v. The Osceola, 34 Fed. Rep. 921; The State of California, 54 Fed. Rep. 404, 4 C. C. A. 393; The Providence, 98 Fed. Rep. 133, 38 C. C. A. 670; The Cayuga, 14 Wall. 270; The Favorita, 18 Wall. 598, 603.

the use of their own boat at the market value of its use, for the time being, as though they had hired her from other persons.[1] Such value is not always determinable by the net value of the charters of the disabled vessel for the days her place was taken by other vessels owned by the same person. The better rule is, where substituted service can be obtained, to measure the recovery by its cost. In The Emma Kate Ross, before the circuit court of appeals for the fourth circuit,[2] it appeared that the vessel was twenty-one days undergoing repairs, and that she was chartered for all but one of them. During eight of these days her owner hired another boat to fill her engagements at a cost of $110 per day. During the remaining days he substituted other boats of which he was the owner. It was ruled that the amount which the disabled boat would have earned under her charters was not to be taken as the measure of the wrong-doer's liability, but that the rate which was paid for the substituted vessel was the proper standard, it not appearing that she was incompetent for the service. It was not improper to apply this rule because the other vessels owned by the libelant were larger than the disabled one, and, therefore, presumably competent to earn more compensation.

The principle we have been considering and which is sustained by an unbroken current of American adjudications was not formerly recognized in England to the same extent it is here. It was there held by the privy council that indemnity for consequential loss from the detention of a vessel can only be recovered where an actual loss resulting therefrom is shown, and reasonable proof of its amount is made. This well-established principle is applied to the question under consideration by holding that a claim for demurrage during the detention of a vessel injured in a collision while a substituted vessel, the property of the same owners, was doing at the defendant's expense and indemnity for loss occasioned by the substitution, the work which the disabled vessel ought to have done, is not recoverable. In other words, only such sum can be recovered as will reimburse the owners for the actual outlay they have

[1] New Haven Steamboat Co. v. Mayor, 36 Fed. Rep. 716; The Emma Kate Ross, 46 id. 872; The Favorita, 18 Wall. 598; The Cayuga, 14 id. 278, 7 Blatch. 385.

[2] 50 Fed. Rep. 845, 2 C. C. A. 55.

incurred, such as for the lodging, maintenance and wages of the crew; loss of profits which might have been earned by the particular vessel are not an element of the damages.[1] The recovery of such profits is not allowable in Ontario, nor is the expense of hiring another vessel to take the place of the one injured.[2] The English case just cited is overthrown by the decisions of the house of lords in two cases stated in the first paragraph of this section. Doubtless the Canadian courts will change the rule there to conform to the law as declared in those cases. The lord chancellor's discussion of The City of Peking is very interesting, and tends to harmonize it with the rule laid down in the cases referred to.

The allowance in favor of a vessel damaged while she is being repaired is measured by the value of her use. The rate of demurrage stipulated for in the charter, it has been held, is not evidence of such value in favor of her owner against a third person;[3] but there are authorities to the contrary.[4] If the rate so stipulated is adopted as the value of the use of a vessel there cannot be also a recovery for wharfage and fees for watchmen, because "demurrage" includes these.[5] The damages recoverable include a charge for wharfage and necessary commissions when there is not an acceptance of the rate of demurrage thus fixed.[6] If expenses have been judiciously incurred in saving property and thus reducing the amount of the loss they are recoverable,[7] although the loss may have been increased by the efforts made.[8] Under this head a recovery has been allowed for expense in unloading the vessel and for the cost of boarding her passengers during the delay beyond the scheduled time of sailing.[9] In awarding compensation for the time a vessel was obliged to lay by in order to have necessary repairs made the allowance will not be extended beyond

[1] The City of Peking, 15 App. Cas. 438 (1890).

[2] Brown v. Beatty, 35 Up. Can. Q. B. 328.

[3] The Jas. A. Dumont, 34 Fed. Rep. 428; The Margaret J. Sanford, 37 id. 148.

[4] The Columbia, 109 Fed. Rep. 660, 48 C. C. A. 596, citing Orhanovich v. The America, 4 Fed. Rep. 337, 342; The Silicia v. The Lord Warden, 30 id. 845.

[5] The C. P. Raymond, 28 Fed. Rep. 765.

[6] The Jas. A. Dumont, 34 Fed. Rep. 428; The Fannie Tuthill, 17 id. 87.

[7] Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. Rep. 596; Hoffman v. Union Ferry Co., 68 N. Y. 385.

[8] The Narragansett, Olcott, 246, 257.

[9] The Saginaw. 95 Fed. Rep. 703.

the time actually incurred for that purpose. Time consumed in consultation between her owner and an attorney in deciding on the former's course will not be regarded.[1] If expenses have been incurred in retaining the crew during the time repairs were being made there may be a recovery of the amount.[2] One of the owners of an injured vessel cannot recover for his time devoted to overseeing repairs to her, it not being shown that there was a necessity for his so doing, that his services were of any value, or had been paid for, or payment promised by his co-owners.[3] Nor can the owner recover the salary paid his superintendent in charge of his dredging work during the time the dredge was being repaired, it appearing that the latter attended to his usual duties notwithstanding the overseeing of the repairs.[4] Dry dockage rendered necessary in order that repairs may be made may be recovered for, as may the cost of new sails bought to replace old ones used for stopping leaks caused by the collision, it not appearing that the latter could have been repaired.[5] A recovery for demurrage must not exceed the sum which the boat as such, and without men or supplies, could have been chartered for.[6] The value of the use of a vessel while detained may be proved otherwise than by the opinions or estimates of experts. A satisfactory way of making such proof is to show the time lost, and her average daily earnings for six months prior and six months subsequent to the date of the collision.[7] In the absence of evidence showing the market value of the use of a vessel the value of her use to the owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for her detention, and the books of the owner showing her earnings about the time of the collision are competent evidence of her probable earnings during the time of her detention.[8] If the owner of a vessel elects to have her sold in a damaged condition demurrage is not recoverable because

[1] Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. Rep. 596.

[2] Hoffman v. Union Ferry Co., 68 N. Y. 385; The Switzerland, 67 Fed. Rep. 617; The Bulgaria, 83 id. 312; Fisk v. City of New York, 119 id. 256.

[3] The State of California, 54 Fed. Rep. 404, 4 C. C. A. 393, 397.

[4] The Itasca, 117 Fed. Rep. 885.

[5] The Switzerland, 67 Fed. Rep. 617.

[6] The Emilie, 4 Bene. 235.

[7] The State of California, 54 Fed. Rep. 404, 4 C. C. A. 393, 396.

[8] The Conqueror, 166 U. S. 110, 127, 17 Sup. Ct. Rep. 510; Sturgis v. Clough, 1 Wall. 269.

interest is the legal indemnity for delay in collecting the balance of her original value from the wrong-doer.[1] Demurrage is not recoverable where a pleasure yacht is injured, no actual loss being shown; the expense of caring for her during the time repairs are being made may be recovered.[2]

§ **1293. Same subject.** As a general rule a vessel which has been damaged may be repaired at the place where the damage was done if that is practicable; but unnecessary expense must not be incurred. If the cost of making repairs there is exceptionally great, and the owner voluntarily takes his vessel to another place where they are made at much less cost, his recovery must not exceed the amount he actually pays for them, including the time and expense of moving his vessel from one place to the other. The fact that an estimate of the expense of repairs was made by surveyors at the port where the damage was done does not suspend the application of this rule.[3] If a vessel sunk by a collision is raised and found to be in such a condition that it is prudent and practicable to repair, if her owners act with promptness they may recover the cost of raising her and her cargo and of making such temporary repairs as she may need,[4] and also the sum it costs to put the vessel, her furniture and fittings into as serviceable a condition as she and they were in before the collision occurred, as well as a reasonable amount of demurrage and compensation for damage sustained by the cargo.[5] If the crew join with the vessel owners in a libel against the vessel in fault they may recover for the loss of their personal effects; but their value should not be put at what it would cost to replace them.[6] If the injured vessel is free from fault the expense of towing her to her home port for permanent repairs, instead of stopping at an intermediate port for temporary repairs, may be recovered if the damage is serious and the navigation was dangerous, in the absence of proof of ignorance or dishonesty on the part of her master.[7] If making repairs results in other

[1] La Champagne, 53 Fed. Rep. 398.

[2] Fisk v. City of New York, 119 Fed. Rep. 256.

[3] The City of Chester, 34 Fed. Rep. 429.

[4] The Catharine v. Dickinson, 17 How. 170.

[5] The Minnie, 26 Fed. Rep. 860; Somerford v. The Melvina, 43 id. 77.

[6] Id.; Leonard v. Whitwill, 19 Fed. Rep. 547.

[7] The Benjamin F. Hunt, Jr., 34 Fed. Rep. 816; The Fannie Tuthill,

expenses they may be recovered; as for surveying,[1] the injuries done a vessel and the superintendence of repairs, and the re-adjustment of the ship's compass, her re-rating at Lloyd's, the cost of the master's protest made in a foreign port, which is required by general usage, and wages of the crew under contract during her detention.[2] It is otherwise as to the expense of the master's protest made in a foreign port as a means of collecting insurance, because that grows out of a contract wholly between insurer and insured, and is not made necessary by the act of the wrong-doer.[3] The expense of saving the lives of the crew of the wrecked vessel and returning them to the nearest port may be recovered. Such services are regarded as being rendered in the performance of a maritime duty, and not as a voluntary charity merely.[4] Salvage money paid by the owner of a damaged vessel and interest thereon is a proper charge against the wrong-doer;[5] but it is otherwise as to the costs and counsel fees incurred in defending a suit to recover for salvage services.[6] There cannot be a recovery of the expenses of a convoy to an injured vessel unless the necessity therefor is made clear.[7]

§ 1294. Interest. Where the loss is only partial the probable earnings have been allowed the libelant if there was no more certain mode of arriving at his loss by the detention of his vessel while repairs were being made. In such cases, and also where the charter value of the vessel is recovered, there cannot also be a recovery of interest. But interest has been allowed on the damages recovered for detention as part of such damages,[8] and on all the items recoverable where the loss was partial,[9] including the sum paid for wrecking services.[10] Where

17 id. 87; Comerford v. The Melvina, 43 id. 77; The Bulgaria, 83 id. 312.

[1] The Bulgaria, 83 Fed. Rep. 312.

[2] The Belgenland, 36 Fed. Rep. 504; New Haven Steamboat Co. v. Mayor, id. 716; The Alaska, 44 id. 498; The Switzerland, 67 id. 617.

It is otherwise as to the expense of

[3] The Belgenland. *supra;* The City of Norwich, 118 U. S. 468.

[4] Leonard v. Whitwill, 19 Fed. Rep. 547.

[5] The Alaska, 44 Fed. Rep. 498; La Champagne, 53 id. 398.

[6] Greenwood v. The Fletcher, 42 Fed. Rep. 504; The Favorite, 4 Bene. 132.

[7] The Alaska, 44 Fed. Rep. 498.

[8] The Natchez, 78 Fed. Rep. 183, 24 C. C. A. 89.

[9] The Bulgaria, 83 Fed. Rep. 312; The Oregon, 89 id. 520.

[10] The John H. Starin, 116 Fed. Rep. 433.

there is a total loss interest on the value of the vessel or cargo is recoverable from the date of the casualty,[1] unless there is a recovery on some other basis than that of the value of the lost property. It is said, however, that the recovery of interest is a matter of discretion, even in a case of total loss.[2] Where the loss is partial only and the vessel proceeded against has been bonded in limited liability proceedings under the federal statutes in a fixed sum to "abide and answer the decree," interest is not to be computed until the date of the decree of the district court;[3] and so where both vessels are at fault.[4] If a vessel is permanently injured compensation is due as of the time the injury was done, and interest as damages for withholding payment may be added, the computation to be made from the time of the injury.[5] It has been said that the allowance of interest upon the cost of repairs and sums expended for salvage services is a matter of discretion; if the repairs make the vessel more valuable than she was before the collision interest will not be allowed.[6] But the better rule is that it should be allowed in the absence of special circumstances rendering it inequitable.[7] Interest was given a libelant who was diligent in bringing the case to a decision, the other party having sought to delay the trial.[8] It has also been recovered on the amount paid for the wreck by the purchaser during the period required by him to make repairs;[9] and on the sum awarded as demurrage for delay in making negotiations respecting repairs made necessary by the collision.[10] One who appeals from a decree in his favor in a collision case thereby puts it out of the power

re-rating if the vessel has been repaired in a different manner from that in which she was originally constructed. Gilkey v. The Beta, 44 Fed. Rep. 389.

[1] Guibert v. British Ship George Bell, 3 Fed. Rep. 581; The Rabboni, 53 id. 952.

[2] The North Star, 44 Fed. Rep. 492, 62 id. 71, 10 C. C. A. 262, 278.

[3] The Manitoba, 122 U. S. 97; The José E. Moré, 37 Fed. Rep. 122; The H. F. Dimock, 77 Fed. Rep. 226, 23 C. C. A. 123, 137.

[4] The Itasca, 117 Fed. Rep. 885.

[5] The Harold, 84 Fed. Rep. 698; The Crathie, [1897] Prob. 178.

[6] The Alaska, 44 Fed. Rep. 498; The Syracuse, 97 id. 978.

[7] Harrison v. Hughes, 119 Fed. Rep. 997, citing The M. Kalbfleisch, 59 id. 198; The Natchez, 78 id. 183, 24 C. C. A. 49; Brent v. Thornton, 45 C. C. A. 214, 106 Fed. Rep. 35; The James A. Dumont, 34 id. 428; The Bulgaria, 83 id. 312.

[8] The Rabboni, 53 Fed. Rep. 948.

[9] La Champagne, 53 Fed. Rep. 398.

[10] The M. Kalbfleisch, 59 Fed. Rep. 198.

of the other party to pay the decree, and is not entitled to interest on his original recovery pending the appeal.[1] Where intervening petitions claiming damages are filed after the discharge of the vessel on stipulation and are treated as original libels, interest on the sum recovered will be computed from the time the order for issuing process was granted.[2] Where the libelant materially changed his case on appeal by new evidence he was allowed interest on the expenditures for repairs only from the time of filing the mandate of the appellate court.[3] On the affirmance of a decree for the libelant, which included interest, he will be allowed interest on the entire sum decreed him in the absence of special circumstances.[4] The rate of interest allowed by courts of admiralty is not affected by state laws; it is usually six per cent.[5]

§ 1295. Mitigation of liability. The common-law doctrine that a wrong-doer's liability is not mitigated by a benefit accruing to the injured party from his contract with another applies in admiralty. Hence the payment of insurance upon a lost vessel does not lessen the liability of the party responsible for a collision;[6] nor is liability for depreciation in the value of a cargo affected because the owner obtained a rebate of duty on account of its damaged condition.[7] In an action to recover for damage done a barge which was in tow of a consort belonging to the owners of the barge the value of the use of the latter is not to be lessened by the rule which fixes the value of towage generally, but only the actual expense of the towage in the particular case.[8]

§ 1296. Recovery by owner of cargo. Where a cargo is lost at sea as the result of a collision its owner is entitled to recover the prime cost or market value of it at the place of shipment, with all charges of lading and transportation, in-

[1] The Express, 59 Fed. Rep. 476, 8 C. C. A. 182.

[2] The Oregon, 89 Fed. Rep. 520.

[3] The Switzerland, 67 Fed. Rep. 617.

[4] The Umbria, 59 Fed. Rep. 475, 8 C. C. A. 181, approving The Blenheim, 18 Fed. Rep. 47, and disapproving Deems v. Canal Line, 14 Blatch. 474.

[5] The Aleppo, 7 Bene. 120, Fed. Cas. No. 158 (following Hemmenway v. Fisher, 20 How. 258); The Oregon, 89 Fed. Rep. 520.

[6] The Monticello v. Mollison, 17 How. 152.

[7] The Umbria, 59 Fed. Rep. 489, 8 C. C. A. 194; The Eroe, 17 Blatch. 16.

[8] The Cayuga, 59 Fed. Rep. 483, 8 C. C. A. 188.

cluding insurance and interest, but without any allowance for anticipated profits.[1] In some cases where the cargo has been recovered and sold after various expenses were incurred in putting it in proper order the rule of damages has been declared to be the difference between the market value of the goods if uninjured and their value as damaged.[2] When the goods have no ascertainable market value at the place of shipment indirect means must be resorted to for the purpose of ascertaining their real value there. In a case where the loss was of a cargo of guano, owned by the Peruvian government, the loss having occurred while the cargo was in transit to New York, it was held that evidence of value based upon an estimate of the price at which sales of it were usually made in New York, with a fair deduction for profits and expenses of every kind, afforded a just basis for fixing the measure of recovery.[3] It has been said that it is immaterial to the application of this rule how near the lost vessel may have been to her port of destination at the time the collision occurred.[4] In several cases, however, as where whales captured at sea have been tortiously converted in regions where there was no market for them or their products, in order to do justice the courts have been obliged to adjust the value of the whales by the price at the controlling market of the country in which the suit has been brought at the time the vessel which sustained the loss could have reached there without unreasonable delay, less the expense of carrying the product to that market.[5] The same rule has been adopted where there have been collisions between whaling and fishing vessels.[6] In the case last referred to the court allowed the price at the nearest port, which was not remote from the place where the injury occurred, such port being a market for fish, and refused to allow the price at the

[1] The Aleppo, 7 Bene. 120; The Umbria, 59 Fed. Rep. 489, 8 C. C. A. 194; The Scotland, 105 U. S. 24.

[2] The Umbria, *supra*.

[3] The Scotland, 105 U. S. 24. In The Joshua Barker, Abb. Adm. 215, there was a loss of cargo through the sole fault of the vessel which had it on board. The damages were measured by its value at the place of delivery.

[4] Guibert v. British Ship George Bell, 3 Fed. Rep. 581; The Amiable Nancy, 3 Wheat. 546; The Vaughan and The Telegraph, 14 Wall. 258, 267.

[5] Bourne v. Ashley, 1 Low. 27; Bartlett v. Budd, id. 223; Taber v. Jenny, 1 Sprague, 315.

[6] Swift v. Brownell, 1 Holmes, 467; Guibert v. British Ship George Bell, 3 Fed. Rep. 581.

port for which the vessel was destined. It was contended that, inasmuch as in collision cases where freight has actually been contracted for, the freight then pending, less the expense of completing the voyage, is allowed as part of the damages, and that in the case of a fishing vessel, the fish on board not having cost anything, the difference between the price at the port nearest which the loss occurred and the price at the port of destination should not be regarded as profit but as the freight earned by the vessel and wages earned by the crew according to the several and respective shares of the former and the latter in the proceeds of the "catch." The court thought the application of the rule contended for would open the doors to the very dangers and uncertainties sought to be excluded by the decisions directed against the recovery of profits in any shape; but allowed the value of the fish at the nearest port without deducting the small expense which would have been incurred in reaching there, and also interest on such value from the time of the collision, but refused to make an allowance for the fish which the master reported might have been taken with reasonable certainty during the portion of the fishing season and which the collision deprived the appellants the benefit of.[1] Where a cargo of dates gathered on the river Euphrates was lost it was held that the shipper might recover as part of his damages the expense of sending an agent there to superintend the picking and the rent of a house for one year for the shelter of the men employed, though the use of the house continued but for six weeks. It appeared that houses are usually rented for that term by those engaged in the business of gathering the fruit.[2] If a collision occurs in American waters the cargo owner may recover average charges legally assessed against the cargo in the foreign port of destination because of the collision, regardless of the time of their payment.[3] Where cargo was laden on board at a foreign port for an English port, and, owing to a collision, was damaged and landed and sold at another English port than that for which it was destined, the recovery was measurable by the

[1] Guibert v. British Ship George Bell, *supra*.

[2] The Umbria, 46 Fed. Rep. 927.

[3] The Energia, 61 Fed. Rep. 222, 66 id. 604, 13 C. C. A. 653.

sound value of the cargo if it had been duly delivered, less the net proceeds of the sale.[1]

A shipper or consignee who has freight on either of two vessels which come into collision with each other, or on a third vessel which is injured by others, may proceed in a common-law court or in admiralty, by a proceeding *in rem* or by a libel *in personam*, against the owner of either or both the offending vessels and recover the entire amount of his damages.[2] If the proceeding is in admiralty against both the offending vessels the decree should be against each of them for one moiety of the entire damages to the extent of the value of the vessels respectively. Any balance of the moiety in excess of the value of either vessel which may not be collected is a charge against the other to the extent of its value beyond its own moiety.[3]

[1] The Activ, 17 Times L. Rep. 351.

[2] The Atlas, 93 U. S. 302; The Juniata, id. 337; The Britannic, 39 Fed. Rep. 395.

[3] The Alabama and The Gamecock, 92 U. S. 695.

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